GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
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February 2, 2018

The Honorable Elissa Silverman
Council of the District of Columbia
Chairperson, Committee on Labor and
Workforce Development
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Suite 115
Washington, D.C. 20004

Dear Councilmember Silverman:

Enclosed are the Office of Employee Appeals' answers to the Performance Oversight Hearing for Fiscal Years 2017 and 2018-to-date. Please feel free to contact me directly if you have additional questions before our scheduled hearing on February 12, 2018.

Sincerely,

SHEILA G. BARFIELD, Esq.
Executive Director

Office of Employee Appeals
FY17-18 Performance Oversight Questions
Committee on Labor and Workforce Development
Councilmember Elissa Silverman (At-Large), Chair

I. Agency Organization

1. Please provide a current **organizational chart** for the agency, including the number of vacant, frozen, and filled positions in each division or subdivision.
    a. Include the names and titles of all senior personnel;
    b. Please provide an explanation of the roles and responsibilities of each division and subdivision.
    c. Please provide a narrative explanation of any changes to the organizational chart made during FY17 or FY18, to date.
    d. Note on the chart the date that the information was collected.

ANSWER: See attachment #1 for the organizational chart. The organizational chart includes a list of all employees by name and title within each of the divisions listed below.

DIVISION ROLES AND RESPONSIBILITIES

OEA Board

The Office of Employee Appeals ("OEA") Board consists of five members. When reviewing Petitions for Review, the entire record is considered by the General Counsel's Office before drafting a proposed Opinion and Order for the Board members. Board members review the Initial Decisions, Petitions for Review, responses to the Petitions for Review, and the proposed Opinion and Orders to determine (through a majority vote) the outcome of the appeal.

Executive Director

The Executive Director reports to the Chair of the OEA Board and oversees all day-to-day operations of the office.

General Counsel's Office

There are three members within the General Counsel's Office – the General Counsel, Deputy General Counsel, and Paralegal. When cases are appealed to the OEA Board, the General Counsel and Deputy General Counsel review the records and drafts proposed Opinions and Orders. These proposed opinions are then presented to the OEA Board for consideration. The General Counsel also provides legal advice to the office; assists with enforcing orders issued by the office; and represents the office in court when necessary.

In addition to assisting the General Counsel and Deputy General Counsel with the duties described above, the Paralegal drafts orders for Administrative Judges and assists with legal

research. She also conducts mediations and prepares the complete record for all appeals filed in the Superior Court for the District of Columbia.

Administrative Judges

Administrative Judges evaluate all cases appealed to the office. It is their responsibility to review all evidence, make rulings, and issue written Initial Decisions. Each of the Administrative Judges also conducts mediations.

Mediation

The Mediation Coordinator identifies all unassigned adverse action appeals that may be mediated. Once cases are assigned to mediators, the mediations are scheduled within 45 days. Additionally, the Mediation Coordinator maintains all unassigned appeals until they are ready for assignment to the Administrative Judges. All OEA attorneys and the office's Paralegal are certified mediators.

Support Staff

The Support Staff performs all administrative office duties.

2. Please attach in Excel a current **Schedule A** for the agency, as of February 1, 2018, with the following information for each position:
    a. Employee's name, if the position is filled;
    b. Program and activity name and code as appears in the budget;
    c. Office name, if different from activity code;
    d. Title/position name;
    e. Position number;
    f. Grade, series, and step;
    g. Salary and fringe benefits (please separate salary and fringe and include the FY17 fringe benefit rate);
    h. Job status (e.g. continuing/term/temporary);
    i. Type of appointment (e.g. career, MSS);
    j. Full-time, part-time, or WAE;
    k. Seasonal or year-round;
    l. Start date in the position (i.e., effective date);
    m. Start date with the agency;
    n. Previous office (program) and position (job title) with the agency, if relevant
    o. Position status (A-active, R-frozen, P-proposed, etc);
    p. Date of vacancy or freeze, if relevant; and
    q. Whether the position must be filled to comply with federal or local law (and if so, please specify what federal or local law applies).

ANSWER: See Attachment #2 for Agency's Schedule A.

3. For any **term or temp position** included in the schedule A and filled in FY17 or FY18,

please provide a brief narrative for why the hire was done on a term or temporary basis and not on a continuing basis.

ANSWER: There were no term positions in FY17 or FY18. The temporary positions are filled by two part-time employees who occupy one full-time equivalent position.

4. Please provide the following information on any **contract workers** in your agency:
    a. Position name
    b. Organizational unit assigned to
    c. Hourly rate
    d. Type of work duties

ANSWER: There are no contract workers within the Agency.

5. Please provide the Committee with a list of **travel** expenses, arranged by employee for FY17 and FY18, to date, including the dates of travel, amount of expenses, and reason for travel. Please specify whether employees may be reimbursed for out-of-pocket travel expenses; and, if so, please describe agency protocol and requirements for employees to apply for and receive reimbursements for such travel expenses, such as necessary documentation, timeframes, and other requirements.

ANSWER: There was no out of city travel in FY17 or FY18-to-date. The agency has local travel expenses that are solely related to metro cards.

6. Please provide the Committee with a list of the total **workers' compensation** payments paid in FY17 and FY18, to date, including the number of employees who received workers' compensation payments, in what amounts, and for what reasons.

ANSWER: There were no workers' compensation payments paid in FY17 or FY18-to-date.

7. For FY17 and FY18, to date, please list each **employee separated** from the agency, other than due to retirement. Also include:
    a. Amount of separation pay, if relevant;
    b. Number of weeks of pay, if relevant; and
    c. The reason for the separation.

ANSWER: In FY18, one employee resigned from the agency to pursue other employment opportunities. The employee did not receive any separation pay.

8. Please provide the Committee with a list of employees who received **bonuses or special award pay** granted in FY 2017 and FY 2018, to date, and identify:
    a. The employee receiving the bonus or special pay;
    b. The amount received; and
    c. The reason for the bonus or special pay.

ANSWER: There were no employees who received bonuses or special award pay during FY17

or FY18-to-date.

9. Please provide the name of each employee who was or is on **administrative leave** (not to include medical leave) in FY 2017 and 2018, to date. In addition, for each employee identified, please provide:
    a. Their position;
    b. A brief description of the reason they were placed on leave;
    c. The dates they were/are on administrative leave;
    d. Expected date of return;
    e. Whether the leave was/is paid or unpaid; and
    f. Their current status (as of February 1, 2018).

ANSWER: No employee was on administrative leave in FY17 and no employee has been on administrative leave in FY18 to date.

10. Please provide a list of each **collective bargaining agreement** that is currently in effect for agency employees.
    a. Please include the bargaining unit (name and local number), the duration of each agreement, and the number of employees covered.
    b. Please provide, for each union, the union leader's name, title, and his or her contact information, including e-mail, phone, and address if available.
    c. Please note if the agency is currently in bargaining and its anticipated completion date.

ANSWER: There are no collective bargaining agreements in effect for any employees within the Agency.

11. Please list in chronological order, any **grievances filed by labor unions** against the agency or agency management in FY16, FY17, or FY18, to date, broken down by source.
    a. For each grievance, give a brief description of the matter as well as the current status.
    b. Include on the chronological list any earlier grievance that is still pending in any forum.
    c. Please describe the process utilized to respond to any complaints or grievances received and any changes to agency policies or procedures that have resulted from complaints or grievances received.
    d. For any complaints or grievances that were resolved in FY17 or FY18, to date, describe the resolution or outcome.

ANSWER: There were no grievances filed by labor unions against the Agency or Agency management in FY16, FY17, or FY18-to-date.

12. Please list in chronological order, any **additional employee grievances or complaints** that the agency received in FY17 and FY18, to date, broken down by source.
    a. For each, give a brief description of the matter as well as the current status.
    b. Include on the chronological list any earlier grievance that is still pending in any forum.

c. Please describe the process utilized to respond to any complaints or grievances received and any changes to agency policies or procedures that have resulted from complaints or grievances received.
d. For any complaints or grievances that were resolved in FY17 or FY18, to date, describe the resolution or outcome.

ANSWER: There were no additional employee grievances or complaints received by the Agency in FY17 or FY18.

13. Please describe the agency's procedures for investigating allegations of **sexual harassment** or misconduct committed by or against its employees. List and describe any allegations received by the agency in FY17 and FY18, to date, and whether or not those allegations were resolved. Please describe the nature of such resolution.

ANSWER: OEA follows the procedures for investigating allegations of sexual harassment or misconduct as outlined in Mayor's Order 2017-313, Sexual Harassment Policy, Guidance and Procedures. The agency did not receive any allegations of sexual harassment or misconduct in FY17 and has not received any in FY18 to date.

14. For any **boards or commissions** associated with your agency, please provide a chart listing the following for each:
    a. For each member:
        1. The member's name;
        2. Confirmation date;
        3. Term expiration date;
        4. List any previous terms served;
        5. Whether the member is a District resident or not; and
        6. Attendance at each meeting in FY17 and FY18, to date.
    b. List any vacancies.
    c. Describe the board's or commission's responsibilities and activities in FY17.

ANSWER:

Board Member	Position	Term Start Date	Term Expiration Date	Previous Term Served	District Resident	Attendance
Sheree Price-Deberry	Board Chair	12/18/2012	04/06/2018	No	Ward 5	100% attendance for FY17 and FY18-to-date
Vera Abbott	Board Member	11/05/2013	04/06/2019	Yes[1]	Ward 8	100% attendance for FY17 and FY18-to-date
Patricia Hobson Wilson	Board Member	12/20/2016	04/06/2022	Yes[2]	Ward 4	100% attendance for FY17 and FY18-to-date
Pamela Victoria Williams	Board Member	12/20/2016	04/06/2018	No	Ward 8	100% attendance for FY17 and FY18-to-date
Jelani Freeman	Board Member	07/11/2017	04/06/2022	No	Ward 2	100% attendance for FY18-to-date

OEA Board Responsibilities

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15. Please list the **task forces and organizations** of which the agency is a member and any associated membership dues paid.

ANSWER: There are no task forces or organizations of which OEA is a member.

II. Budget and Expenditures

16. **Budget**
    a. Please provide a table showing your agency's Council-approved original budget, revised budget (after reprogrammings, etc.), and actual spending, by program and

[1] Vera Abbott served the unexpired term of a previous Board member. Her term started on December 4, 2012, and the term ended on April 6, 2013. Ms. Abbott was re-appointed to the Board to serve her own full term on November 5, 2013.

[2] Patricia Hobson Wilson served the unexpired term of a previous Board member. Her term started on February 4, 2014, and the term ended on April 6, 2016. Mrs. Hobson Wilson was re-appointed to the Board to serve her own full term on December 20, 2016.

activity, for FY17 and the first quarter of FY18. For each program and activity, please include total budget and break down the budget by funding source (federal, local, special purpose revenue, or intra-district funds).

b. Include any over- or under-spending. Explain any variances between fiscal year appropriations and actual expenditures for FY17 for each program and activity code.
c. Attach the cost allocation plans for FY17 and FY18.
d. In FY16 or FY17, did the agency have any federal funds that lapsed? If so, please provide a full accounting, including amounts, fund sources (e.g. grant name), and reason the funds were not fully expended.

ANSWER: See Attachment #3.

17. Please provide a table listing all **intra-District transfers** for FY17 and FY18 (YTD), as well as anticipated transfers for the remainder of FY18.
    a. For each transfer, include the following details:
        i. Buyer agency;
        ii. Seller agency;
        iii. The program and activity codes and names in the sending and receiving agencies' budgets;
        iv. Funding source (i.e. local, federal, SPR);
        v. Description of MOU services;
        vi. Total MOU amount, including any modifications;
        vii. Whether a letter of intent was executed for FY17 or FY18 and if so, on what date;
        viii. The date of the submitted request from or to the other agency for the transfer;
        ix. The dates of signatures on the relevant MOU; and
        x. The date funds were transferred to the receiving agency.
    b. Attach copies of all intra-district transfer MOUs or MOAs, other than those for overhead or logistical services, such as routine IT services or security.
    c. Please list any additional intra-district transfers planned for FY18, including the anticipated agency(ies), purposes, and dollar amounts.

ANSWER: See Attachment #4.

18. Please provide a table listing every **reprogramming** of funds (i.e. local, federal and SPR) into and out of the agency for FY17 and FY18, to date, as well as anticipated inter-agency reprogramming for the remainder of FY18. Please attach copies of the reprogramming documents, including the Agency Fiscal Officer's request memo and the attached reprogramming chart. For each reprogramming, include:
    a. The reprogramming number;
    b. The sending or receiving agency name;
    c. The date;
    d. The dollar amount;
    e. The funding source (i.e. local, federal, SPR);

f. The program, activity, and CSG codes for the originating funds;
g. The program, activity, and CSG codes for the received funds; and
h. A detailed rationale for the reprogramming.

ANSWER: OEA did not reprogram into and out of the agency during FY17 and FY18-to-date.

19. Please list, in chronological order, every **reprogramming** *within* your agency during FY17 and FY18, to date, as well as any anticipated intra-agency reprogramming. Please attach copies of any reprogramming documents. For each reprogramming, include:
    a. The date;
    b. The dollar amount;
    c. The funding source (i.e. local, federal, SPR);
    d. The program, activity, and CSG codes for the originating funds;
    e. The program, activity, and CSG codes for the received funds; and
    f. A detailed rationale for the reprogramming.

ANSWER: See Attachment #5.

20. For FY17 and FY18, to date, please identify any **special purpose revenue funds** maintained by, used by, or available for use by the agency. For each fund identified, provide:
    a. The revenue source name and fund code;
    b. A description of the program that generates the funds;
    c. The revenue funds generated annually by each source or program;
    d. Expenditures of funds, including the purpose of each expenditure; and
    e. The current fund balance (i.e. budget versus revenue)

ANSWER: There are no special purpose revenue funds maintained by, used by, or available for use by OEA.

21. Please list all **memoranda of understanding** ("**MOU**") and memoranda of agreement ("MOA") entered into by your agency during FY17 and FY18, to date, as well as any MOU or MOA currently in force. (You do not need to repeat any intra-district MOUs that were covered in the question above on intra-district transfers.)
    a. For each MOU, indicate:
        i. The parties to the MOU or MOA;
        ii. Whether a letter of intent was signed in the previous fiscal year and if so, on what date;
        iii. The date on which the MOU or MOA was entered;
        iv. The actual or anticipated termination date;
        v. The purpose; and
        vi. The dollar amount.
    b. Attach copies of all MOUs or MOAs, other than those for overhead or logistical services, such as routine IT services or security.
    c. Please list any additional MOUs and MOAs planned for FY18, including the anticipated agency(ies), purposes, and dollar amounts.

ANSWER: See Attachment #6.

22. Part I. The committee would like to better understand the agency's programmatic needs and the associated budgetary costs. Please submit copies of your **FY19 budget submission to the Mayor's Office of Budget and Finance (OBF).** In FY19, this includes:
    a. The Operating Budget Submission Memo;
    a. Attachment A, Vacancy List;
    b. Form 1 (Impact of Agency's Marc);
    c. Form 2 (Enhancement Requests); and
    d. Attachment B, List of intra-districts.

    Part II: In addition, please identify:
    a. Which of your agency's MARC reductions and hypothetical 2% cuts (Form 1) were accepted or rejected (i.e. if the cut was rejected, the funds were not swept and if the cuts were accepted, the funds were swept) ; and
    b. Which of your agency's enhancement requests (Form 2) were accepted (i.e. which enhancements were added to your agency's FY19 budget).

    Part III: For FY16 and FY17, please include each fiscal year's information for #24 Part I and Part II. Please indicate if your agency is willingly omitting any information requests in Part I and Part II.

ANSWER: See Attachment #7.

23. Please list each **grant or sub-grant**, including multi-year grants, received by your agency in FY17 and FY18, to date. List the following:
    a. Source;
    b. Purpose;
    c. Timeframe;
    d. Dollar amount received;
    e. Amount expended;
    f. How the grant is allocated if it is a multi-year grant; and
    g. How many FTEs are dependent on each grant's funding, and if the grant is set to expire, what plans, if any, are in place to continue funding the FTEs.

ANSWER: There are no grants or sub-grants received by OEA in FY17 or FY18-to-date.

24. Please describe every **grant** your agency is, or is considering, applying for in FY18.

ANSWER: OEA is not applying for or considering applying for any grants in FY18.

25. Please list each **contract, procurement, and lease** leveraged in FY17 and FY18 (year-to-date) with a value amount of $10,000.00 or more. "Leveraged" includes any contract, procurement, or lease used by the agency as a new procurement establishment (i.e. HCA,

BPA, etc.), contract extension, and contract option year execution. This also include direct payments (if applicable). For each contract, procurement, or lease leveraged, please attach a table with the following information, where applicable:

Part I

a. Contractor/Vendor Name;
b. Contract Number;
c. Contract type (e.g. HCA, BPA, Sole Source, single/exempt from competition award, etc.);
d. Description of contractual goods and/or services;
e. Contract's outputs and deliverables;
f. Status of deliverables (e.g. whether each was met or not met, in-progress, etc.);
g. Copies of deliverables (e.g. reports, presentations);
h. Contract Administrator name and title assigned to each contract and/or procurement;
i. Oversight/monitoring plan for each contract and associated reports, performance evaluations, cure notices, and/or corrective action plans;
j. Subcontracting status (i.e. Did the Contractor sub any provision of goods and/or services with another vendor);
k. Requisitions and purchase order numbers established under each contract;
l. Corresponding, obligated amounts for each purchase order;
m. Corresponding, expended amounts (actuals) for each purchase order;
n. Funding source for each requisition and purchase order;
o. Index and PCA codes used each requisition and purchase order;
p. Activity code and name for each index and PCA used under requisitions and purchase orders;
q. Total contract or procurement value in FY17;
r. Total contract or procurement value in FY18 (YTD);
s. Period of performance (e.g. May 31 to April 30);
t. Current year of contract (e.g. Base Year, Option Year 1, etc.).

ANSWER: OEA has no contract, procurement or lease leveraged in FY17 and FY18 with a value amount of $10,000.00 or more.

Part II: Please attach monitoring documentation, including any monitoring reports or performance evaluations developed for use. If any contract is performance-based, specify the basis of performance (i.e. the metrics) and describe the payment formula.

ANSWER: Not applicable.

26. Please list each **grant** awarded by your agency during FY17 and FY18 (year-to-date) for good and/or services provided by your agency. Please attach any documentation of monitoring, including any reports developed. At a minimum, please include the following grant programs in your response:

For each grant, please include the following information, where applicable:

Part I

a. Grant/Program Title;
b. Grant/Program Number;
c. Grantee Name;
d. Description of goods and/or services;
e. Grant's outputs and deliverables;
f. Status of deliverables (e.g. whether each was met or not met, in-progress, etc.);
g. Copies of deliverables (e.g. reports, presentations);
h. Program Manager name and title assigned to each grant;
i. Grant Administrator name and title assigned to each grant;
j. Oversight/monitoring plan for each grant and associated reports, performance evaluations, cure notices, and/or corrective action plans;
k. Sub-granting status (i.e. Did the Grantee sub any provision of goods and/or services with another vendor);
l. Requisitions and purchase order numbers established under each grant;
m. Corresponding, obligated amounts for each purchase order;
n. Corresponding, expended amounts (actuals) for each purchase order;
o. Funding source for each requisition and purchase order;
p. Index and PCA codes used each requisition and purchase order;
q. Activity code and name for each index and PCA used under requisitions and purchase orders;
r. Total grant award value in FY17;
s. Total grant award value in FY18 (YTD);
t. Period of performance (e.g. May 31 to April 30);
u. Current year of grant award (e.g. Base Year, Option Year 1, etc.);

ANSWER: OEA was not awarded any grants during FY17 or FY18-to-date.

Part II: Please attach monitoring documentation, including any monitoring reports or performance evaluations developed for use. If any grant is performance-based, specify the basis of performance (i.e. the metrics) and describe the payment formula.

ANSWER: Not Applicable

III. Agency performance, evaluation, and disputes

27. Please list all pending **lawsuits** that name the agency as a party.
    a. Provide the case name, court, where claim was filed, case docket number, and a brief description of the case.
    b. Identify which cases on the list are lawsuits that potentially expose the District to significant financial liability or will result in a change in agency practices, and describe the current status of the litigation.
    c. Please provide the extent of each claim, regardless of its likelihood of success.
    d. For those identified, please include an explanation about the issues involved in each case.

ANSWER: The following matters are pending lawsuits where the Office of Employee of Appeals is named as a party. The Office of Employee Appeals is named in these law suits for the limited purpose of filing the complete record for each matter in Superior Court for the District of Columbia and the D.C. Court of Appeals. All of the lawsuits listed below potentially expose the city to significant monetary liability. However, none of the liability can be attributed to the Office of Employee Appeals. Any judgments imposed as a result of these law suits are the sole responsibility of the agency that initiated the employment action against each employee. Those agencies that are liable are listed below.

No.	Case Name	Case Number	Date Filed	Matter Pending Before	Agency Liable	Disposition
1.	John Muller v. D.C. Public Library	2016 CA 006817 P(MPA)	11/01/2016	Superior Court for the District of Columbia	D.C. Public Library	Closed – Dismissed by Consent on 03/14/2017
2.	Edward Morgan v. D.C. Fire and Emergency Medical Services	2016 CA 007541 P(MPA)	12/11/2016	Superior Court for the District of Columbia	D.C. Fire and Emergency Medical Services	Closed – Matter Remanded to OEA on 09/22/2017
3.	Sarinita Beale and Judy Cofield v. Office of Contracting and Procurement	2016 CA 006119 P(MPA)	12/6/2016	Superior Court for the District of Columbia	Office of Contracting and Procurement	Closed - Motion for Reconsideration denied on 09/28/2017
4.	Scott Sefton v. D.C. Fire and Emergency Medical Services	2016 CA 008232 P(MPA)	12/13/2016	Superior Court for the District of Columbia	D.C. Fire and Emergency Medical Services	Closed - Matter Dismissed on 07/31/2017 on Employee's Motion
5.	Janell Johnson v. D.C. Public Schools	2015 CA 005853 P(MPA)	12/13/2016	Superior Court for the District of Columbia	D.C. Public Schools	Closed - Matter Dismissed on 12/16/2016 and Employee's Motion to Reopen Denied on 08/01/2017
6.	Cecile Thorne v. D.C. Public Schools	2016 CA 007543 P(MPA)	12/13/2016	Superior Court for the District of Columbia	D.C. Public Schools	Closed - Order Reversing OEA Decision on 09/07/2017
7.	Heather Straker v. Metropolitan Police Department	2016 CA 005655 P(MPA)	1/19/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Closed - Order Reversing OEA Decision on 08/29/2017
8.	Christopher Sanders v. Metropolitan Police Department	2016 CA 009282 P(MPA)	2/8/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Closed - Dismissed on 03/23/2017 on Employee's Motion
9.	Robert Johnson v. D.C. Fire and Emergency Medical Services	2016 CA 009257 P(MPA)	3/8/2017	Superior Court for the District of Columbia	D.C. Fire and Emergency Medical Services	Open - Status Hearing on 02/09/2018

10.	James Rice v. Department of Motor Vehicles	2017 CA 000290 P(MPA)	3/8/2017	Superior Court for the District of Columbia	Department of Motor Vehicles	Open - Status Hearing on 03/16/2018
11.	Samuel Jackson, Jr. v. D.C. Public Schools	2016 CA 007146 P(MPA)	3/13/2017	Superior Court for the District of Columbia	D.C. Public Schools	Open - Status Hearing on 02/16/2018
12.	Joseph O'Rourke v. Metropolitan Police Department	2017 CA 001104 P(MPA)	3/31/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing on 03/23/2018
13.	Dale Jackson v. Department of Health	2017 CA 001384 P(MPA)	4/11/2017	Superior Court for the District of Columbia	Department of Health	Open -Status Hearing on 05/18/2018
14.	Beverly Day v. Department of Public Works	2016 CA 005498 P(MPA)	5/16/2017	Superior Court for the District of Columbia	Department of Public Works	Open -Status Hearing on 02/23/2018
15.	Samson Adeboye v. Metropolitan Police Department	2017 CA 002469 P(MPA)	6/8/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing on 02/09/2018
16.	Brenda Toyer v. Metropolitan Police Department	2017 CA 002470 P(MPA)	6/8/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing 12/15/2017
17.	Darryl Boone v. Metropolitan Police Department	2017 CA 002471 P(MPA)	6/14/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing on 03/02/2018
18.	Zack Gamble v. Metropolitan Police Department	2017 CA 002472 P(MPA)	6/15/17	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing on 03/23/2018
19.	Willie Porter v. Department of Behavioral Health	2017 CA 002495 P(MPA)	6/23/2017	Superior Court for the District of Columbia	Department of Behavioral Health	Open - Status Hearing on 04/27/2018
20.	Steve Steinberg v. D.C. Fire and Emergency Medical Services	2017 CA 003421 P(MPA)	6/23/2017	Superior Court for the District of Columbia	D.C. Fire and Emergency Medical Services	Open - Status Hearing on 03/16/2018
21.	Robert Johnson v. D.C. Fire and Emergency Medical Services	2016 CA 009257 P(MPA)	7/6/2017	Superior Court for the District of Columbia	D.C. Fire and Emergency Medical Services	Open -Status Hearing on 02/09/2018
22.	Alice Lee v. Metropolitan Police Department	2017 CA 003525 P(MPA)	7/10/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing 01/12/2018
23.	Widmon Butler v. Metropolitan Police Department	2017 CA 003455 P(MPA)	7/17/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing on 02/09/2018
24.	Jalonda Phillips-Armstead et al. v. Department of Corrections	2017 CA 004669 P(MPA)	8/25/2017	Superior Court for the District of Columbia	Department of Corrections	Open - Status Hearing on 03/23/2018
25.	Sholanda Miller v. Metropolitan Police Department	2017 CA 004500 P(MPA)	8/29/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing on 02/23/2018
26	Jamell Stallings v. Metropolitan Police Department	2017 CA 005243 P(MPA)	9/6/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open – Hearing on 01/12/2018, Petitioner's brief due 2/13/2018, Respondent 4/13/2018

27.	Gina Vaughn v. Metropolitan Police Department et al.	2017 CA 005525 P(MPA)	9/26/2017	Superior Court for the District of Columbia	Metropolitan Police Department	Open- Status Hearing 04/20/2018
28.	Karleane Johnson v. Department of Health	13-CV-790	10/21/2016	D.C. Court of Appeals	Department of Health	Closed – Dismissed on 07/28/2017
29.	Theodore E. Powell v. D.C. Public Schools	16-CV-486	2/22/2017	D.C. Court of Appeals	D.C. Public Schools	Closed – Dismissed on 03/31/2017
30.	Aprille Washington v. D.C. Public Schools	2017 CA 003829 P(MPA)	01/04/2018	Superior Court for the District of Columbia	D.C. Public Schools	Open - Scheduling Conference Hearing 02/02/2018
31.	Francine Thomas v. Metropolitan Police Department	2017 CA 004678 P(MPA)	01/09/2018	Superior Court for the District of Columbia	Metropolitan Police Department	Closed – Dismissed on 12/14/2017
32.	Widmon Butler v. Metropolitan Police Department	2017 CA 007843 P(MPA)	01/17/2018	Superior Court for the District of Columbia	Metropolitan Police Department	Open - Status Hearing 03/02/2018

28. Please list all **settlements** entered into by the agency or by the District on behalf of the agency in FY17 or FY18, to date, including any covered by D.C. Code § 2-402(a)(3), which requires the Mayor to pay certain settlements from agency operating budgets if the settlement is less than $10,000 or results from an incident within the last two years. For each, provide
    a. The parties' names;
    b. The amount of the settlement; and
    c. If related to litigation, the case name, court where claim was filed, case docket number, and a brief description of the case; or
    d. If unrelated to litigation, please describe the underlying issue or reason for the settlement (e.g. Administrative complaint, etc.).

ANSWER: There were no settlements entered into by OEA or on behalf of OEA in FY17 or FY18-to-date.

29. Please list in chronological order, all **administrative grievances or complaints** filed by parties outside the agency against the agency in FY17 or FY18, to date, broken down by source. Include on the chronological list any earlier grievance that is still pending in any judicial forum.
    a. For each grievance or compliant, give a brief description of the matter as well as the current status.
    b. Please describe the process utilized to respond to any complaints and grievances received and any changes to agency policies or procedures that have resulted from complaints or grievances received.
    c. For any complaints or grievances that were resolved in FY17 or FY18, to date, describe the resolution.

ANSWER: There are no administrative grievances or complaints filed by parties against OEA in FY17 or FY18-to-date.

30. Please list and describe any ongoing **investigations, audits, or reports** on the agency or any employee of the agency, or any that were completed during FY17 and FY18, to date. Please attach copies of any such document.

ANSWER: There have been no investigations, studies, audits, or reports on OEA or any employee of OEA during fiscal years 2016 or 2017 (to date).

31. Please provide a copy of the agency's FY17 **performance accountability report.**
    a. Please explain which performance plan strategic objectives and key performance indicators (KPIs) were met or completed in FY17 and which were not.
    b. For any met or completed objective, also note whether they were completed by the project completion date of the objective and/or KPI and within budget. If they were not on time or within budget, please provide an explanation.
    c. For any objective not met or completed, please provide an explanation.

ANSWER: See Attachment #8.

32. Please provide a copy of your agency's FY18 **performance plan** as submitted to the Office of the City Administrator. Please discuss any changes to outcomes measurements in FY17 or FY18, including the outcomes to be measured, or changes to the targets or goals of outcomes; list each specifically and explain why it was dropped, added, or changed.

ANSWER: See Attachment #9.

33. Please provide the number of **FOIA requests** for FY17 and FY18, to date, that were submitted to your agency.
    a. Include the number granted, partially granted, denied, and pending.
    b. Provide the average response time, the estimated number of FTEs required to process requests, the estimated number of hours spent responding to these requests, and the cost of compliance.
    c. Did the agency file a report of FOIA disclosure activities with the Secretary of the District of Columbia? Please provide a copy of that report as an attachment.

ANSWER: See Attachment #10.

34. Please provide a list of all **studies, research papers, reports, and analyses** that the agency prepared or contracted for during FY17 and FY18, to date. Please attach a copy if the study, research paper, report, or analysis is complete. For each study, paper, report, or analysis, please include:
    a. The name;
    b. Status, including actual or expected completion date;
    c. Purpose;

d. Author, whether the agency or an outside party;
e. Reference to the relevant grant or contract (name or number) in your responses above; and
f. Source of funding (program and activity codes) if not included in responses above.

ANSWER: There have been no studies, research papers, reports, or analysis that OEA prepared or contracted for FY17 or FY18-to-date.

35. Please list all **reports or reporting** currently required of the agency in federal law, the District of Columbia Code, or Municipal Regulations. For each, include
    a. The statutory code or regulatory citation;
    b. Brief description of the requirement;
    c. Any report deadlines;
    d. Most recent submission date; and
    e. A description of whether the agency is in compliance with these requirements, and if not, why not.

ANSWER: D.C. Official Code §1-606.01(g)(3) provides the following:

The Office shall:

> (A) Establish and maintain systems for the timely processing, recording, and control of cases;
>
> (B) Maintain a data base system to record and provide information on the status and disposition of cases;
>
> (C) Prepare and certify official records;
>
> (D) Publish final decisions of the Office;
>
> (E) Provide initial responses to Freedom of Information Act requests;
>
> (F) Manage a formal system for the organization, maintenance, and disposition of Office records;
>
> (G) Formulate and implement programs and policies that provide research assistance to the Office and the public; and
>
> (H) Maintain an updated index of cases, to include among other things subject matter and outcome, to provide research assistance to the Office and the public.

OEA is in compliance with each statutory requirement listed above. Matters are timely assigned and processed as they are filed with OEA. The office maintains a database that captures the status and disposition of each case. Official records are prepared and certified to the Superior

Court of the District of Columbia within the requisite sixty-day period. Freedom of Information Act requests are similarly addressed by our office within the statutory timeframe. After the OEA database and website revamp, to be completed at the end of this fiscal year, the agency will be able to increase its current efforts to the organization, maintenance, and disposition of records; provide research assistance to the public; and maintain an updated index of cases by subject matter and outcome for the office and the public.

Additionally, D.C. Official Code §1-606.02(a)(3) provides the following:

> (a) The Office shall have, in addition to the authority necessary and proper for carrying out its duties as specified elsewhere in this subchapter, the authority to:
>
> > (3) Issue an annual report on the activities of the Office to the Mayor and Council which should include, at a minimum, the following:
> >
> > > (A) The number and nature of cases heard by the Office, and the type of order issued in each case;
> > >
> > > (B) The number of appeals heard by Office panels and the disposition of such appeal or type of order issued in each case;
> > >
> > > (C) The number of appeals taken to Superior Court of the District of Columbia (both directly and from Office panels) and the disposition of or status of each case; and
> > >
> > > (D) A statement of the amount of time taken to reach a final disposition of each case brought before the Office and a statement of the number of backlogged cases, if any.

Through Quickbase, the District government's reporting database, OEA provides an annual report of all of the requirements listed above.

36. Please provide a list of any additional **training or continuing education** opportunities made available to agency employees. For each additional training or continuing education program, please provide the subject of the training, the names of the trainers, and the number of agency employees that were trained. What training deficiencies, if any, did the agency identify during FY17 and FY18, to date?

ANSWER: No additional training or continuing education opportunities have been made available to agency employees.

37. Please discuss **performance evaluations**.
    a. Does the agency conduct annual **performance evaluations** of all its employees?
    b. Who conducts such evaluations?
    c. What steps are taken to ensure that all agency employees are meeting individual job requirements?

ANSWER: The agency conducts annual performance evaluations of all of its employees. Individual supervisors conduct the evaluations and the Executive Director reviews and approves the evaluations of all agency employees except for the General Counsel. OEA's Board Chairperson conducts the evaluations of the Executive Director and the General Counsel. Periodic meetings throughout the fiscal year occur with each employee to ensure that the employee is meeting his or her individual job requirements.

38. Please list all **recommendations identified by the Office of the Inspector General, D.C. Auditor, or other federal or local oversight entities** during FY16, FY17, or FY18, to date. Please provide an update on what actions have been taken to address each recommendation. If the recommendation has not been implemented, please explain why.

ANSWER: No recommendations were identified by the Office of the Inspector General, D.C. Auditor, or other federal or local oversight entity during FY16, FY17, or FY18, to date.

IV. Agency Operations

39. How did the agency address its **top five priorities** in FY17? What are the agency's top five priorities in FY18? Please explain how the agency expects to address these priorities in FY18.

ANSWER: The agency worked very diligently in FY17 to address its top five priorities. The agency's top priorities for FY18 are to conduct a thorough review of the Office's Rules of Procedure; develop a system to track how many motions for extensions of time are filed to include at what stage in the process the motion is most often filed, which party most often makes the request, how much additional time is requested, and what is the ruling of the judge; continue issuing Initial Decisions within the statutory timeframe; ensure the security of the agency; and rebuild the database and website. The agency will address these priorities in FY18 by redrafting its rules to more accurately reflect how the agency processes appeals; monitoring motions for extensions of time; monitoring each judge's docket to ensure that decisions are being issued in a timely manner; working with representatives from the Department of General Services, Protective Services Division to ensure the agency has adequate security; and working with representatives from the Office of the Chief Technology Officer to rebuild the agency's database and website.

40. Please describe any **initiatives** that the agency implemented in FY17 or FY18, to date, to improve the internal operations of the agency or the interaction of the agency with outside parties. Please describe the results, or expected results, of each initiative.

ANSWER: In FY17, the agency developed a system for prioritizing decisions which had been remanded to the Office so that those decisions could be processed in a timely manner. This initiative was completed by September 31, 2017. Additionally, certain uniform orders were created for the various proceedings within the adjudicatory process. Some Administrative Judges prefer, however, to use orders which they have drafted and find are better suited to the

appeal. This initiative was mostly completed by September 31, 2017. The agency's FY18 initiatives are in the process of being implemented.

41. Please list each **new program** implemented by the agency during FY17 and FY18, to date. For each program, please provide:
    a. A description of the program;
    b. The funding required to implement to the program;
    c. The program and activity codes in the budget; and
    d. Any documented results of the program.

ANSWER: In FY17, the agency developed a system for prioritizing decisions which had been remanded to the Office so that those decisions could be processed in a timely manner. This initiative was completed by September 31, 2017. Additionally, certain uniform orders were created for the various proceedings within the adjudicatory process. Some Administrative Judges prefer, however, to use orders which they have drafted and find are better suited to the appeal. This initiative was mostly completed by September 31, 2017. Information pertaining to the funding required to implement the program and the program and activity codes in the budget has not been obtained.

42. Please explain the impact on your agency of any **legislation** passed or regulations adopted at the federal level during FY17 and FY18, to date, which significantly affect agency operations.

ANSWER: There was no legislation passed, or regulations adopted, at the federal level during FY17 and in FY18, to date, which significantly affected the agency's operations.

43. Please identify any **legislative requirements** that your agency lacks sufficient resources to properly implement. Please explain.

ANSWER: Currently, there are no legislative requirements for which the agency lacks sufficient resources to properly implement.

44. Please discuss any **legislation** your agency plans to submit to the Council in FY18 or FY19.

ANSWER: Currently, the agency has no plans to submit any legislative requests to the Council in FY18. Moreover, at this time, the agency does not know whether it will need to submit any legislative requests to the Council in FY19.

45. Please identify any **statutory or regulatory impediments** to your agency's operations.

ANSWER: There are no statutory or regulatory impediments to the agency's operations.

46. Please list all **regulations** for which the agency is responsible for oversight or implementation.

a. For each regulation, please list the chapter and subject heading, and the date of the most recent revision.
b. Please list any pending or planned regulatory action, including the chapter and subject, status, and actual or anticipated completion date.

ANSWER: Appeals filed with the Office of Employee Appeals are covered by the District Personnel Manual (DPM) chapters 6, 16, and 24. Additionally, the Office of Employee Appeals is governed by D.C. Official Code § 1-606.01 *et seq.*

47. Please identify all **electronic databases** maintained by your agency, including the following:
    a. A detailed description of the information tracked or maintained within each system;
    b. The age of the system and any discussion of substantial upgrades that have been made or are planned to the system; and
    c. Whether the public can be granted access to all or part of each system.

ANSWER: The agency maintains one electronic database. The database stores all documents that are submitted to the agency and that are generated by the agency. The database can create reports pertaining to the number and type of appeals currently pending, the number of decisions issued by the agency and by each individual judge, and the assignment of appeals. The current system was built in 2009. Because the Executive Director must maintain the security of documents and claims as provided in D.C. Official Code § 1-606.01(g)(2)(C), the public cannot be granted access to any part of the agency's database.

48. Please provide a detailed description of any **new technology** acquired or any upgrades to existing technology in FY17 and FY18, to date, or anticipated for the remainder of FY18.
    a. Include the cost, what it does, and the budget program and activity codes that fund it.
    b. Cross reference to any relevant contracts (name or number) in the responses above.
    c. Please explain if there have there been any issues with implementation.

ANSWER: The agency is in the process of working with the Office of the Chief Technology Officer to upgrade its database and website. The upgraded database will improve the workflow process and increase its capability to generate reports. The Memorandum of Understanding to implement this project has been signed by all parties and the funds have been transferred. The cost of the project is $243,000. Information pertaining to the budget program and activity codes was not obtained. So far, there have not been any implementation issues.

V. Office of Employee Appeals

49. What efforts has the agency made in the past year to increase transparency? The Committee has noted that the website is often out-of-date. What procedures does OEA have in place to ensure that the website is consistently up-to-date, particularly after changes in board membership?

ANSWER: Due to the sensitive nature of the appeals filed with the agency, D.C. Official Code § 1-606.01(g)(2)(C) requires the agency's Executive Director to "[m]aintain the security of documents and claims[.]" However, all decisions issued by the agency are promptly uploaded to the agency's website. Moreover, the agency responds to all FOIA requests and timely provides those documents which are subject to public disclosure. Additionally, the agency continues to input certain information pertaining to its operations into the District's tracking system on a quarterly basis. Information on the website is periodically reviewed to ensure its accuracy.

50. Please provide a narrative explanation and timeline for the progress, including a target completion date, of the effort to create a searchable database of the agency's decisions, which was funded in the FY18 budget.

    ANSWER: The upgraded database will improve the workflow process and increase its capability to generate reports. Moreover, the public will have greater capability of searching the agency's decisions on its website. The goal is to have the project completed by the end of FY18.

51. Please provide the following for FY16, FY17, and the first quarter of FY18 (identify the court hearing the appeal when relevant):
    a. The number of decisions issued;
    b. The average time to issue an initial decision;
    c. The average time to issue an opinions;
    d. The average time to issue a final order;
    e. The number of decisions appealed;
    f. The number of pending appeals;
    g. The number of successful appeals of OEA decisions (including decisions to remand);
    h. The number of OEA decisions upheld on appeal; and
    i. A narrative description explaining each decisions that was reversed or remanded along with a copy of any opinion issued with the remand or reversal.

ANSWER: See Attachment #11.

As it relates to the remanded and reversed matters, the following is a narrative description of each case.

Fiscal Year 2016 (Reversed)

Ernest Hunter v. D.C. Child and Family Services – Before OEA, Agency argued that a Consent Order was the source of its authority to conduct a RIF action in this case. However, Agency changed its position on its appeal to Superior Court and asserted that it had the statutory authority to conduct RIFs without Mayoral approval. Specifically, the Agency claimed before the Court that D.C. Code § 1-604.06 designated personnel authority to the Agency Director. Thus, Agency argued that it was not required to obtain the Mayor's approval to conduct the RIF. In light of this new argument, the Court agreed as a matter of law and reversed OEA's decision. The D.C. Court of Appeals agreed, and on November 17, 2017, it affirmed the Superior Court's ruling. See Attachment #12.

William Barnette v. Department of General Services – At the time that the matter was appealed to OEA, the agency was the Office of Public Education Facilities Management which later became the Department of General Services. At issue in this case was Agency's ability to create lesser competitive areas in RIF actions. OEA held that because the Office of Public Education Facilities Management was an independent agency, it did not need the Mayor's approval to create a lesser competitive area. However, the Superior Court for the District of Columbia disagreed. It held that the Mayor is the personnel authority of all employees of the D.C. government with two exceptions – employees of D.C. Public School and the University of the District of Columbia. Because Agency did not seek Mayoral approval and failed to follow other DPM regulations, the Court reversed the OEA Decision; vacated the RIF; and reinstated Employee with back pay and benefits. This matter is currently pending in the D.C. Court of Appeals. See Attachment #13.

Fiscal Year 2016 (Remanded)

Omonhodion Okojie v. Department of Mental Health – The Superior Court for the District of Columbia found that OEA had jurisdiction over Employee's appeal because he did not authorize the union to initiate the grievance procedure on his behalf. It reasoned that because Employee had no knowledge that a grievance was filed on his behalf, OEA had jurisdiction to consider his appeal. Accordingly, the matter was remanded to OEA to conduct further proceedings.

On remand, the parties settled the matter, and an Initial Decision on Remand was issued on July 8, 2016, closing the case. See Attachment #14.

Mary Oates Walker v. Office of Administrative Hearings – The Superior Court for the District of Columbia found that OEA should have conducted an evidentiary hearing in this matter. It reasoned that given the severity of the charges against Employee; conflicting record evidence; and the requirements of the Due Process Clause, a hearing was necessary in this case. Thus, the case was remanded for the Administrative Judge to conduct an evidentiary hearing.

The OEA Administrative Judge held a ten-day evidentiary hearing in May of 2017. Closing arguments were due by November 3, 2017. The Judge is reviewing the arguments and drafting an Initial Decision on Remand. See Attachment #15.

Sarnita Beale and Judy Cofield v. Office of Contract and Procurement – The Superior Court for the District of Columbia affirmed OEA's determination that D.C. Official Code § 1-624.08 applied to the RIF because the conclusion is supported by substantial evidence in the record. The court likewise affirmed OEA's determination that it lacked jurisdiction to consider Employees' reemployment rights. However, the Court ruled that OEA's conclusion that the RIF was executed in accordance with the relevant laws and regulations is not supported by substantial evidence. As a result, it remanded this case to OEA for further proceedings.

On July 8, 2016, the OEA Administrative Judge issued an Initial Decision on Remand upholding Employees' removal. The Superior Court of the District of Columbia affirmed the decision in Part and reversed it in part. This matter is currently pending in the D.C. Court of Appeals. See Attachment #16.

Paula Edmiston v. Metropolitan Police Department – The Superior Court for the District of Columbia found that the OEA Administrative Judge and a previous Superior Court judge did not specifically addressed whether General Order 120.21 could be applied if it conflicted with a District of Columbia Municipal Regulation (DCMR). The judge determined that the OEA Administrative Judge correctly concluded that the new general order could be applied retroactively to Employee's case. However, the Administrative Judge did not address the issue of whether the General Order was superseded by the relevant DCMR regulation. Consequently, the judge remanded the matter for this determination to be made by the Administrative Judge.

An Initial Decision on Remand and Opinion and Order on Petition for Review were issued by OEA reversing Employee's termination action. Agency appealed the Board's decision to Superior Court, where the matter is pending. See Attachment #17.

Pamela Dishman v. D.C. Public Schools – The Superior Court for the District of Columbia held that there was contradictory evidence in the record regarding Employee's competitive level as a Program Manager. The judge found that two job data documents listed Employee as a Coordinator. Therefore, the judge remanded the matter to OEA.

On June 9, 2017, the OEA Administrative Judge ruled that the parties settled the matter, and the appeal was dismissed. See Attachment #18.

Florentino Rodriguez v. Department of Human Resources – The D.C. Court of Appeals reversed the Superior Court decision. The Court held that even if a Collective Bargaining Agreement (CBA) is expired, it may still be applicable if the parties continue to act as if they are performing under the terms. Moreover, it provided that notice to an Employee will not suffice as notice to the union. Finally, it reasoned if a CBA specifically provides that if Agency fails to issue notice, then discipline is precluded – then OEA cannot automatically rely on the harmless error rule. Therefore, the Court remanded the matter to OEA for further determinations.

On October 31, 2017, the OEA Administrative Judge ruled that the parties settled the matter, and the appeal was dismissed. See Attachment #19.

Fiscal Year 2017 (Reversed)

Heather Straker v. Metropolitan Police Department – The Superior Court for the District of Columbia ruled that the OEA Administrative Judge's Initial Decision on Remand went beyond the scope of what she was ordered to determine in accordance with the OEA Board's Opinion and Order. The Court held that the Administrative Judge awarded more than Employee may have been entitled to receive in back pay. Ultimately, it left the amount to be paid in back pay up to the Agency to determine. Accordingly, the Initial Decision on Remand was reversed. See Attachment #20.

Cecile Thorne v. D.C. Public Schools – The Superior Court for the District of Columbia found that OEA erroneously relied on Employee's SF-50 to determine his group placement. The Court ruled that OEA improperly referenced the IMPACT procedures and exceeded its scope of review by interpreting the IMPACT process instead of determining if the IMPACT procedure was

followed. Consequently, Agency's removal action was upheld, and OEA's decision was reversed. See Attachment #21.

Fiscal Year 2017 (Remanded)

Lelonie Curry-Mills v. Department of Youth and Rehabilitation Services – The Superior Court for the District of Columbia agreed with OEA that the notice sent to Employee and returned as undeliverable was not constitutionally effective to trigger an appeal deadline. However, it found that Employee never received clear notice of her appeal rights. Therefore, the judge remanded the matter to OEA for further consideration.

Per a January 23, 2018 Status Report, parties are actively engaged in settlement negotiations at OEA. See Attachment #22.

Donald Frazier v. D.C. Public Schools – After OEA issued its decisions, it was argued on appeal in Superior Court that OEA lacked jurisdiction to consider licensing issues. The Court held that the jurisdictional issue was raised for the first time on appeal, and therefore, was not considered by OEA. Thus, the Court remanded the matter to OEA to determine whether it has jurisdiction over Employee's appeal.

An Initial Decision on Remand was issued on December 21, 2017, dismissing Employee's appeal. The Administrative Judge determined that he was an at-will employee. See Attachment #23.

Ella Cuff v. Department of General Services – The Superior Court for the District of Columbia found that Employee made a prima facie allegation of involuntariness that would entitle her to a hearing, given OEA's jurisdiction over involuntary retirement. As a result, the matter was remanded to OEA to determine if Employee's retirement was voluntary.

The OEA Administrative Judge conducted an evidentiary hearing on November 20, 2017. Closing arguments were submitted on January 8, 2018. The Administrative Judge is reviewing the record and drafting the Initial Decision on Remand. See Attachment #24.

Willie Porter v. Department of Mental Health –The Superior Court for the District of Columbia found that "no authority is conferred upon the Superior Court to award fees related to review of decisions made by the OEA because the Court sits in the position of an appellate court when reviewing Merit Personnel cases." However, in determining that it lacked jurisdiction, the Court did not evaluate OEA's authority to award attorney's fees for services rendered in the Superior Court. Therefore, the Court remanded the matter to OEA to determine whether OEA is empowered to award attorney's fees for services rendered in Superior Court.

The Administrative Judge has conducted status conferences in an effort to resolve this matter. The next conference is scheduled for March 3, 2018. See Attachment #25.

Edward Morgan, Sr. v. D.C. Fire and Emergency Medical Services – The Superior Court for the District of Columbia held that the OEA Board could have considered an argument by

Agency, even though it was not raised before the Administrative Judge. Therefore, the matter was remanded for further consideration.

The Administrative Judge issued an Order on Jurisdiction on December 18, 2017. Judge ordered responses due on January 23, 2018. See Attachment #26.

Laura Jackson v. Department of Health – The D.C. Court of Appeals held that OEA must address errors in the calculation of service computation dates. Because agencies have the burden of proof, we must hold them accountable for proving that the service dates are accurate. This means requiring evidence of the calculation of service computation dates from other employees to ensure that the retention register is accurate. Therefore, the matter was remanded to OEA.

The parties are working to determine the service computation date for Ms. Jackson and another employee. The Administrative Judge will issue an order scheduling a Status Conference on February 23, 2018. See Attachment #27.

Fiscal Year 2018 (Reversed)
There have been no reversals of OEA decisions thus far.

Fiscal Year 2018 (Remanded)
Abraham Evans v. Metropolitan Police Department – Both Agency and Employee requested that the Superior Court for the District of Columbia remand the matter to OEA. The matter was remanded to OEA without discussion or analysis.

The Administrative Judge held a Status Conference on December 19, 2017. Subsequently, he has ordered that both parties submit briefs, which are due by April 23, 2018. See Attachment #28.

52. What was the caseload for each hearing examiner in FY17 and FY18 to date?

ANSWER:

FISCAL YEAR 2017

Administrative Judge	Number of Decisions Issued
Judge Lim	29
Judge Robinson	25
Judge Hochhauser	14
Judge Dohnji	24
Judge Harris	24
Judge Cannon	27
TOTAL	**143**

FISCAL YEAR 2018

Administrative Judge	Number of Decisions Issued	Number of Cases Pending
Judge Lim	11	14
Judge Robinson	2	16
Judge Hochhauser	6	8
Judge Dohnji	9	13
Judge Harris	3	15
Judge Cannon	6	16
TBA	N/A	15
TOTAL	**36**	**97**

53. Please list the statutory deadlines OEA must meet for each step of its process, the average time it took to complete that step, the number of cases that reached that step within the deadline, and the number that did not. Please explain any steps that were not completed within statutory deadlines.

ANSWER: D.C. Official Code Section 1-606.03(c) provides the following, as it relates to OEA's statutory deadlines:

> All decisions of the Office shall include findings of fact and a written decision, as well as the reasons or basis for the decision upon all material issues of fact and law presented on record, and order; provided, however, that the Office may affirm a decision without findings of fact and a written decision. . . . Any decision by a Hearing Examiner shall be made within 120 days, excluding Saturdays, Sundays, and legal holidays, from the date of the appellant's filing of the appeal with the Office. Within 45 days, excluding Saturdays, Sundays, and legal holidays, after the appeal is filed with the Office, the Office shall determine whether, in accordance with this section and the Office's own rules, the Office has jurisdiction. . . . In accordance with § 1-604.04, the Office may promulgate rules to allow a Hearing Examiner a reasonable extension of time if extraordinary circumstances dictate that an appeal cannot be decided within the 120-day period. . . .

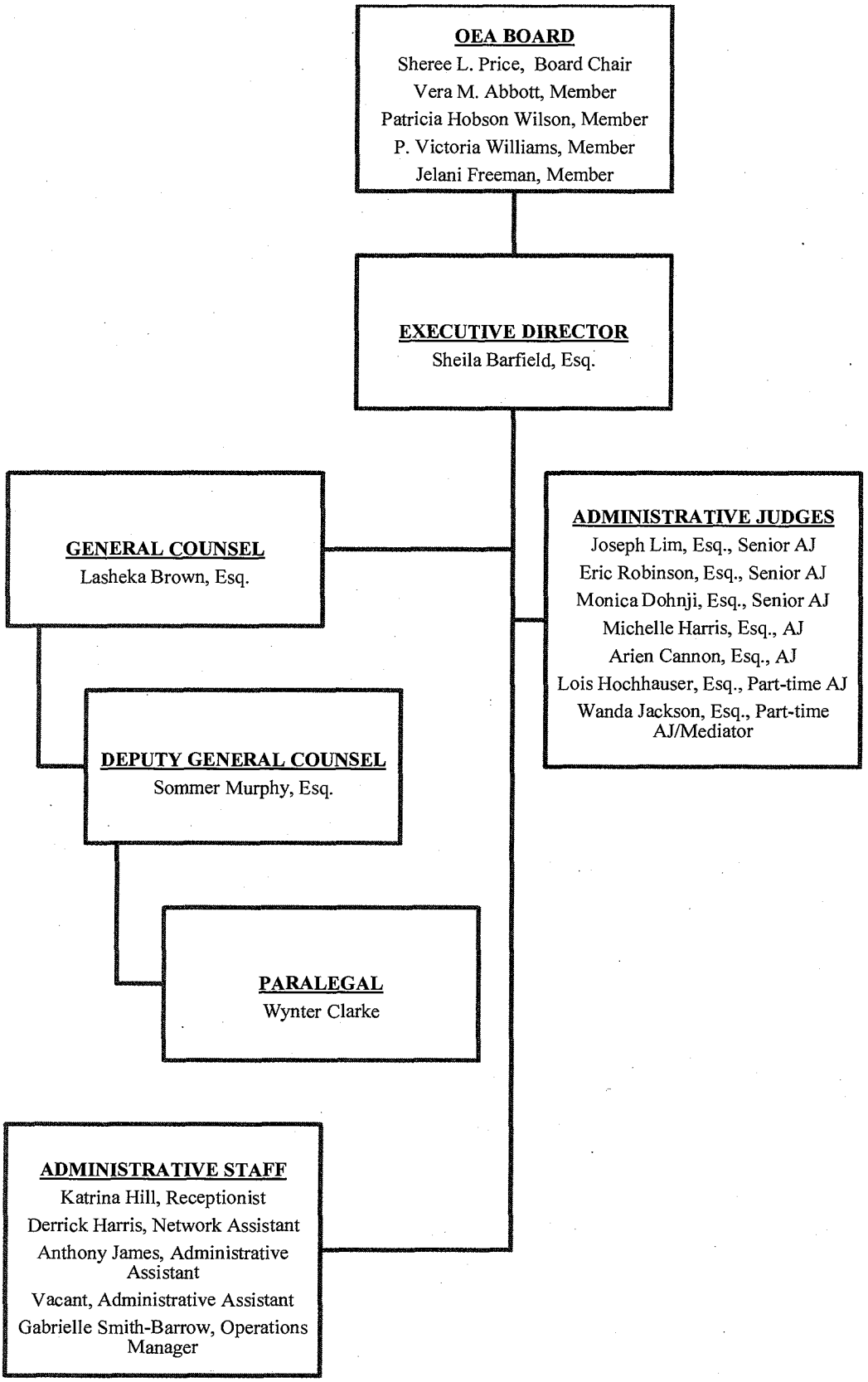
As it relates to issuing decisions within 120 business days, OEA has met this goal. Of all the decisions rendered in FY17, on average OEA issued them within 120 business days. In FY17, ninety-three (93) out of the total one hundred and forty-three (143) Initial Decisions were issued within the 120-day statutory period. Therefore, fifty (50) cases were issued beyond the 120-day period.

In FY18, OEA has exceeded the 120 business days' deadline. On average, Initial Decisions have been issued within 80 business days. In FY18-to-date, twenty-seven (27) out of the total thirty-

four (34) decisions were issued within the 120-day statutory period. Therefore, only seven (7) cases were issued beyond the 120-day period.

In accordance with the Code, jurisdictional matters shall be determined within 45 business days. Preliminary determinations are made on all jurisdictional cases within five (5) business days. In FY17, five (5) out of twenty-six (26) jurisdictional cases had final decisions issued within 45 business days. In FY18, two (2) out of the twelve (12) jurisdictional cases have had final decisions issued within 45 business days.

Attachment 1



Effective as of 02/02/2018

Attachment 2

Office of Employee Appeals

FY2018 Position Listing Report

As of February 01, 2018

Posn Nbr	Title	Name	Grade	Step	Salary	Fringe (20.5%)	Prgm Code	Activity Code	Job Status	TYPE OF APPROINTMENT	Position Type	Start Date in Postion	Start Date in Agency	Postion Status	Vacancy Date	Legal Requirement
00032406	Network Assistant	Harris,Derrick D	9	1D	$ 6D,757.00	$ 12,455.19	1000 - AGENCY MANAGEMENT PROGRAM	1040-INFDRMATION TECHNOLOGY	Reg - Fuii Time	Career	Year-round	11/14/2004	11/14/2004	Active		
00026005	Receptionist	Hill,Katrina	6	10	$ 46,317.00	$ 9,494.99	1000 - AGENCY MANAGEMENT PROGRAM	1085-CUSTOMER SERVICE	Reg - Full Time	Career	Year-round	5/1/1997	5/1/1997	Active		
00007174	EXECUTIVE DIR	Barfield,Sheila	17	0	$ 172,897.39	$ 35,443.96	1000 - AGENCY MANAGEMENT PROGRAM	1090-PERFORMANCE MANAGEMENT	Reg - Full Time	Excepted Serv	Year-round	9/6/2011	10/1/1993	Active		
00088930	Administrative Assistant	Vacant	6	0	$ 35,247.0D	$ 7,225.64	1000 - AGENCY MANAGEMENT PROGRAM	1090-PERFORMANCE MANAGEMENT	Reg - Full Time		Year-round			Active	XXXX	None
00006993	GEN COUNSEL	Bassey,Lasheka Brown	15	8	$ 162,707.00	$ 33,354.94	1000 - AGENCY MANAGEMENT PROGRAM	1100-OFFICE OF EMPLOYEE APPEALS	Reg - Fuii Time	Legal Service	Year-round	10/1/2011	5/15/2005	Active		
0001B547	Operations Manager	Smith Barrow,Gabrielle P	14	7	$ 114,199.00	$ 23,41D.80	1000 - AGENCY MANAGEMENT PROGRAM	1100-OFFICE OF EMPLOYEE APPEALS	Reg - Fuii Time	Career	Year-round	10/7/2002	10/7/2002	Active		
00036540	PARALEGAL SPECIALIST	Clarke,Wynter A	12	2	$ 72,528.00	$ 14,868.24	1000 - AGENCY MANAGEMENT PROGRAM	1100-OFFICE OF EMPLOYEE APPEALS	Reg - Fuii Time	Career	Year-round	5/23/2016	5/23/2016	Active		
00036642	Hearing Examiner	Robinson,Eric Theodore	15	0	$ 106,989.44	$ 21,932.84	1000 - AGENCY MANAGEMENT PROGRAM	1100-OFFICE OF EMPLOYEE APPEALS	Reg - Fuii Time	Career	Year-round	6/12/2005	6/12/2005	Active		
00037517	Administrative Assistant	James,Anthony Lester	6	10	$ 46,317.00	$ 9,494.99	1000 - AGENCY MANAGEMENT PROGRAM	1100-OFFICE OF EMPLOYEE APPEALS	Reg - Fuii Time	Career	Year-round	7/25/2005	7/25/2005	Active		
00001974	Hearing Examiner	Hochhauser,Lois C	14	5	$ 54,031.50	$ 11,D76.46	2000 - ADJUDICATION	2001-ADJUDICATION PROCESS	Temp - WAE		Year-round	4/3/1985	4/3/1985	Active		
00014026	Hearing Examiner	Lim,Joseph Edward	15	0	$ 117,543.63	$ 24,D96.44	2000 - ADJUDICATION	2001-ADJUDICATION PROCESS	Reg - Full Time		Year-round	8/3/1998	8/3/1998	Active		
00019834	Senior Administrative Judge	Dohnji,Monica N	14	5	$ 108,063.00	$ 22,152.92	2000 - ADJUDICATION	2001-ADJUDICATION PROCESS	Reg - Fuii Time		Year-round	12/27/2015	5/26/2011	Active		
00047295	Deputy General Counsel	Murphy,Sommer Joy	14	3	$ 119,635.00	$ 24,525.18	2000 - ADJUDICATION	2001-ADJUDICATION PROCESS	Reg - Fuii Time	Career	Year-round	12/27/2015	6/9/2008	Active		
00075085	HEARING EXAMINER	Harris,Michelle R	13	3	$ 86,244.00	$ 17,680.D2	2000 - ADJUDICATION	2001-ADJUDICATION PROCESS	Reg - Fuii Time	Career	Year-round	7/27/2015	7/27/2015	Active		
00077069	HEARING EXAMINER	Cannon,Arien Peyton	13	7	$ 96,632.00	$ 19,809.56	2000 - ADJUDICATION	2001-ADJUDICATION PROCESS	Reg - Fuii Time	Career	Year-round	1/1/2012	10/1/2012	Active		
00010846	Hearing Examiner	Jackson,Wanda L	14	4	$ 52,497.50	$ 10,761.99	2000 - ADJUDICATION	2003-MEDIATION	Temp - WAE	Excepted Serv	WAE	12/6/2004	11/18/1978	Active		

Note: FY 2017 agency fringe rate was 20.7%

Attachment 3

CH0 - OFFICE OF EMPLOYEE APPEALS

FY 2017 & 2018 Budget to Actual Expenditure

Fund	Fiscal Year	Program	Activity	Approved Budget	Revised Budget	Actual Expenditure	Intra-District Adva	Encumbrance	Pre Encumbrance	Available Balance	Variance Explanation
Local	2017	1000 - AGENCY MANAGEMENT	1040 - INFORMATION TECHNOLOGY	$68,822	$68,822	$78,212	$0	$0	$0	($9,390)	Adjusted salary & actual fringe expediture higher than budget
		PROGRAM	1085 - CUSTOMER SERVICE	$52,935	$52,935	$63,013	$0	$0	$0	($10,078)	Adjusted salary & actual fringe expediture higher than budget
			1090 - PERFORMANCE MANAGEMENT	$200,661	$200,661	$234,666	$0	$0	$0	($34,005)	Transfer 1 FTE from Activity 1100
			1100 - OFFICE OF EMPLOYEE APPEALS	$704,766	$704,766	$667,069	$0	$0	$0	$37,697	Net effect of 1 FTE transfer to Activity 1090; legal services salary adjustment as well as expenses of Act 2003
		1000 - Total		$1,027,184	$1,027,184	$1,042,960	$0	$0	$0	($15,776)	
		2000 - ADJUDICATION	2001 - ADJUDICATION PROCESS	$600,266	$600,266	$649,183	$0	$0	$0	($48,917)	Legal services salary increase & other salary adjustments
			2002 - APPEALS	$122,627	$122,627	$75,450	$0	$0	$0	$47,177	Unspent NPS balance
			2003 - MEDIATION	$65,216	$65,216	$0	$0	$0	$0	$65,216	Postion funding error. Exopenses are reflected under act 1100
		2000 - Total		$788,109	$788,109	$724,633	$0	$0	$0	$63,476	
		2017 Total		**$1,815,293**	**$1,815,293**	**$1,767,593**	**$0**	**$0**	**$0**	**$47,700**	
	2018	1000 - AGENCY MANAGEMENT	1040 - INFORMATION TECHNOLOGY	$73,212	$73,212	$19,921	$0	$0	$0	53,290.93	
		PROGRAM	1085 - CUSTOMER SERVICE	$55,812	$55,812	$15,809	$0	$0	$0	40,002.60	
			1090 - PERFORMANCE MANAGEMENT	$248,729	$248,729	$54,748	$0	$0	$0	193,981.64	
			1100 - OFFICE OF EMPLOYEE APPEALS	$612,130	$612,130	$146,238	$0	$0	$0	$465,891	
		1000 - Total		$989,883	$989,883	$236,717	$0	$0	$0	$753,167	
		2000 - ADJUDICATION	2001 - ADJUDICATION PROCESS	$700,647	$700,647	171,009.45	$0	$0	$0	529,638.04	
			2002 - APPEALS	$375,245	$375,245	10,000.41	253,907.29	16,559.15	$0	94,777.81	
			2003 - MEDIATION	$63,259	$63,259	$15,215	$0	$0	$0	$48,044	
		2000 - Total		$1,139,152	$1,139,152	$196,225	$253,907	$16,559	$0	$672,460	
		2018 (YTD) Total		**$2,129,035**	**$2,129,035**	**$432,942**	**$253,907**	**$16,559**	**$0**	**$1,425,627**	

Attachment 4

Office of Employee Appeals
FY 2017 - FY 2018 Intra-Distrct Transfers

Fiscal Year	Seller Agency	Buyer Agency	Service Description	Program	Activity	Fund	Service Period	LOI	Total Amount
FY 2017	OCP	OEA	Purchase Card	2000 - ADJUDICATION	2002 - APPEALS	Local	10/01/16 - 09/30/17	No	$ 52,000.00
	Total								**$ 52,000.00**
FY 2018	OCP	OEA	Purchase Card	2000 - ADJUDICATION	2002 - APPEALS	Local	10/01/17 - 09/30/18	No	$ 3,245.00
	OCTO	OEA	RTS	2000 - ADJUDICATION	2002 - APPEALS	Local	10/01/17 - 09/30/18	No	$ 16,489.00
	OCTO	OEA	Website Enhancement	2000 - ADJUDICATION	2002 - APPEALS	Local	10/01/17 - 09/30/18	No	$ 234,769.00
	Total								**$ 254,503.00**

Office of Employee Appeals
FY 2017 - FY 2018 Reprogrammings

Fiscal Year	Date	Fund	From	To	Description	Amount
2017	Jun-17	Local	PGM: 2000 - Ajudication; Acivity: 2002 - Appeals; CSG 0040 & 0041	PGM: 2000 - Ajudication; Acivity: 2002 - Appeals; CSG 0020 & 0070	Office supplies and IT hardware & software purchases	36,000.00
2018						

Attachment 5

Office of Employee Appeals
FY 2017 - FY 2018 Reprogrammings

Fiscal Year	Date	Fund	From	To	Description	Amount
2017	Jun-17	Local	PGM: 2000 - Ajudication; Acivity: 2002 - Appeals; CSG 0040 & 0041	PGM: 2000 - Ajudication; Acivity: 2002 - Appeals; CSG 0020 & 0070	Office supplies and IT hardware & software purchases	36,000.00
2018						

Attachment 6

Office of Employee Appeals
FY 2017 - FY 2018 MOUs

Fiscal Year	Seller Agency	Buyer Agency	Service Description	Fund	Service Period	LOI	Total Amount
FY 2017	OCP	OEA	Purchase Card	Local	10/01/16 - 09/30/17	No	$ 52,000.00
	Total						**$ 52,000.00**
FY 2018	OCP	OEA	Purchase Card	Local	10/01/17 - 09/30/18	No	$ 3,245.00
	OCTO	OEA	RTS	Local	10/01/17 - 09/30/18	No	$ 16,489.00
	OCTO	OEA	Website Enhancement	Local	10/01/17 - 09/30/18	No	$ 234,769.00
	Total						**$ 254,503.00**

Attachment 7

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

MEMORANDUM

TO: **Gordon McDonald**
Deputy Chief Financial Officer
Office of Budget and Planning

THRU: **Mohamed Mohamed**
Associate Chief Financial Officer
Government Operations Cluster

Alemayehu Awas
Agency Fiscal Officer
Government Operations Cluster

FROM: **Sheila G. Barfield**
Executive Director
Office of Employee Appeals

DATE: **November 02, 2017**

SUBJECT: **FY 2019 Budget Submission - Office of Employee Appeals (CH0)**

This memorandum approves the electronic transmission of the Office of Employee Appeals FY 2019 proposed budget. The agency's gross budget submission of **$1,886,807** includes Local budget authority of $1,886,807 and 15 Full-Time Equivalent (FTE) positions.

The major changes from FY 2018 to FY 2019 include:

- A net decrease of $242,228 or 11.4 percent in local funds, including a decrease of $244,000 (one-time funding for OEA's website upgrade) in non-personnel services and a net increase of $1,772 in personnel services adjustments.

If you have any questions, please contact Alemayehu Awas at (202) 727 6535.

Attachments

cc: Michael Bolden, Director of Financial Operations, Government Operations Cluster
Christine Mukolwe, Budget Director, Government Operations Cluster
Frehiwot Deresso, Financial Manager, Government Operations Cluster
Eric Cannady, Director for Budget Administration, Office of Budget and Planning
Stacy-Ann White, Deputy Director for Budget Administration, Office of Budget & Planning
Benjamin Iyun, Budget Administration Analyst, Office of Budget and Planning

CH0 - OFFICE OF EMPLOYEE APPEALS
FY 2019 Proposed Operating Budget Summary

0100 LOCAL FUND	
PERSONNEL SERVICES	1,768,983

Position No	Position Title	Name	Grade \ Step	Program	FTE	FY 2018 Actual Salary	FY 2019 Proposed Budget				
							Salary	Step Increases	Salary + Increases	Fringe Benefits	Total Salary + Fringe
00001974	Hearing Examiner	Hochhauser,Lois C	14 \ 5	2001	0.50	54,031.50	54,031.50	0.00	54,031.50	11,076.46	65,107.96
00006993	GEN COUNSEL	Bassey,Lasheka Brown	15 \ 8	1100	1.00	158,311.00	162,707.00	0.00	162,707.00	33,354.94	196,061.94
00007174	EXECUTIVE DIR	Barfield,Sheila	17 \ 1	1090	1.00	166,247.49	172,897.39	0.00	172,897.39	35,443.96	208,341.35
00010846	Hearing Examiner	Jackson,Wanda L	14 \ 4	2003	0.50	52,497.50	52,497.50	0.00	52,497.50	10,761.99	63,259.49
00014026	Hearing Examiner	Lim,Joseph Edward	15 \ 1	2001	1.00	117,543.63	117,543.63	0.00	117,543.63	24,096.44	141,640.07
00018547	Operations Manager	Smith Barrow,Gabrielle P	14 \ 7	1100	1.00	114,199.00	114,199.00	2,840.97	117,039.97	23,993.19	141,033.16
00019834	Senior Administrative Judge	Dohnji,Monica Numbosi	14 \ 5	2001	1.00	104,995.00	108,063.00	0.00	108,063.00	22,152.91	130,215.91
00026005	Receptionist	Hill,Katrina	06 \ 10	1085	1.00	46,317.00	46,317.00	0.00	46,317.00	9,494.98	55,811.98
00032406	Network Assistant	Harris,Derrick D	09 \ 10	1040	1.00	60,757.00	60,757.00	0.00	60,757.00	12,455.18	73,212.18
00036540	PARALEGAL	Clarke,Wynter A	12 \ 3	1100	1.00	72,528.00	74,711.00	0.00	74,711.00	15,315.76	90,026.76
00036642	Hearing Examiner	Robinson,Eric Theodore	15 \ 1	1100	1.00	106,989.44	106,989.44	0.00	106,989.44	21,932.84	128,922.28
00037517	Administrative Assistant	James,Anthony Lester	06 \ 10	1100	1.00	46,317.00	46,317.00	0.00	46,317.00	9,494.98	55,811.98
00047295	Deputy General Counsel	Murphy,Sommer Joy	14 \ 3	2001	1.00	115,895.00	119,635.00	2,889.52	122,524.52	25,117.53	147,642.05
00075085	HEARING EXAMINER	Harris,Michelle R	13 \ 3	2001	1.00	86,244.00	86,244.00	0.00	86,244.00	17,680.02	103,924.02
00077069	HEARING EXAMINER	Cannon,Arlen Peyton	13 \ 8	2001	1.00	96,632.00	99,229.00	0.00	99,229.00	20,341.94	119,570.94
00088930	Administrative Assistant	Johnson,Fuanyi S	06 \ 5	1090	1.00	40,167.00	40,167.00	0.00	40,167.00	8,234.23	48,401.23
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

NON-PERSONNEL SERVICES	117,824

CSG	CSG TTILE					FY 2017 Original Budget	FY2017 Revised Budget		FY2017 Actual (as of 10/31)	FY2018 Budget	FY2019 Budget
0020	SUPPLIES AND MATERIALS					10,200.00	10,200.00		10,800.51	3,244.66	3,000.00
0031	TELEPHONE, TELEGRAPH, TELEGRAM, ETC					0.00	0.00		350.00	0.00	
0040	OTHER SERVICES AND CHARGES					55,819.86	55,819.86		33,540.89	327,000.00	83,824.00
0041	CONTRACTUAL SERVICES - OTHER					25,407.05	25,407.05		23,772.17	40,000.00	30,000.00
0070	EQUIPMENT & EQUIPMENT RENTAL					31,200.00	31,200.00		6,415.30	5,000.00	1,000.00
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TOTAL FY2019 BUDGET/MARC	1,886,807

Certified By: [signature]

Office of Employee Appeals (OEA)
Non-Personal Services (NPS)
Budget Detail

OBJECT 20 - SUPPLIES

Office of Employee Appeals (CH0)

PROGRAM/CC	ACTIVITY/RC	FUND	INDEX	PCA	OBJECT	DESCRIPTION OF SUPPLIES	FY 2017 Approved Budget	FY 2017 Actual (As of 10/31)	FY 2018 Approved Budget	FY 2019 Proposed Budget	Variance	Explanation
AMP - Contracting & Procurement	1020	0100	11020	11020	0201	General Of Supplies	$ 10,200.00	$ 10,800.51	$ 3,244.68	$ 3,000.00	(244.66)	
						Sub Total	$10,200.00	$10,800.51	$3,244.66	$3,000.00	(244.66)	

OBJECT 40 - OTHER SERVICES AND CHARGES

Office of Employee Appeals (CH0)

PROGRAM/CC	ACTIVITY/RC	FUND	INDEX	PCA	OBJECT	Description of SERVICE	FY 2017 Approved Budget	FY 2017 Actual	FY 2018 Proposed Budget	FY 2019 Proposed Budget	Variance	Explanation
AMP - Contracting & Procurement	1020	0100	11020	11020	0408	Professional Services/ Court Reporting	$ 24,500.00	$ 17,235.42	$ 16,000	$ 6,370	(6,630.00)	
AMP - Contracting & Procurement	1020	0100	11020	11020	0401	Local Travel	$ 487.88	$ 200.85	$ 400	$ 500	100.00	
AMP - Contracting & Procurement	1020	0100	11020	11020	0408	Website upgrade	$ -	$ -	$ 244,000		(244,000.00)	
AMP - Contracting & Procurement	1020	0100	11020	11020	0408	RTS Additional	$ -	$ 350.00	$ 500		(500.00)	
AMP - Contracting & Procurement	1020	0100	11020	11020	0405	Machinery maintenance and repair	$ 3,200.00	$ 594.82	$ 2,200	$ 1,704	(496.05)	
AMP - Contracting & Procurement	1020		11020	11020	0407	Machinery maintenance and repair				$ 3,000	3,000.00	
AMP - Contracting & Procurement	1020		11020	11020	0411	Printing	$ 5,000.00					
AMP - Contracting & Procurement	1020	0100	11020	11020	0416	Postage	$ 7,300.00	$ 8,500.00	$ 2,300	$ 1,500	(800.00)	
AMP - Contracting & Procurement	1020	0100	11020	11020	0419	Training	$ -	$ -	$ 5,000		(5,000.00)	
AMP - Contracting & Procurement	1020	0100	11020	11020	0427	Board Members Comp	$ 15,332.00	$ 9,010.00	$ 30,600	$ 25,000	(5,600.00)	
AMP - Contracting & Procurement	1020		11020	11020	0408	OCTO VPN				$ 16,439	16,438.92	
AMP - Contracting & Procurement	1020	0100	11020	11020	0408	Web Meintenance	$ -	$ -	$ 27,000	$ 29,311	2,311.13	
						Sub Total	$55,819.88	$33,890.89	$327,000.00	$83,824.00	(249,176.00)	

OBJECT 41 - CONTRACTUAL SERVICES - OTHER

Office of Employee Appeals (CH0)

	ACTIVITY/RC	FUND	INDEX	PCA	OBJECT	OBJECT	FY 2017 Approved Budget	FY 2017 Actual	FY 2018 Proposed Budget	FY 2019 Proposed Budget	Variance	Explanation
AMP - Contracting & Procurement	1020	0100	11020	11020	0409	Contractual Services - Court reporting	$ 25,407.05	$ 23,772.17	$ 40,000.00	$ 30,000.00	(10,000.00)	
						Sub Total	$25,407.05	$23,772.17	$40,000.00	$30,000.00	(10,000.00)	

OBJECT 70 - EQUIPMENT CHANGES

Office of Employee Appeals (CH0)

PROGRAM/CC	ACTIVITY/RC	FUND	INDEX	PAC	OBJECT	EQUIPMENT DESCRIPTION	FY 2017 Approved Budget	FY 2017 Actual	FY 2018 Proposed Budget	FY 2019 Proposed Budget	Variance	Explanation
Adjudication	2002	0100	20002	12002	0702	Furniture and Equipment	$ 29,000.00	$6,415.30				
Adjudication	2002	0100	20002	12002	0710	IT Hardware Acquisition	$ 1,100.00	$ -	$ 2,500		(2,500.00)	
AMP - Information& Technology	1040	0100	11040	11040	0711	It Softwera Acquisition	$ 1,100.00	$ -	$ 2,500	$ 1,000	(1,500.00)	

Office of Employee Appeals (OEA)
Non-Personal Services (NPS)
Budget Detail

Sub Total	$31,200.00	$6,415.30	$5,000.00	$1,000.00	(4,000.00)	
TOTAL	$122,626.91	$74,878.87	$375,244.66	-$117,824.00	(257,420.66)	

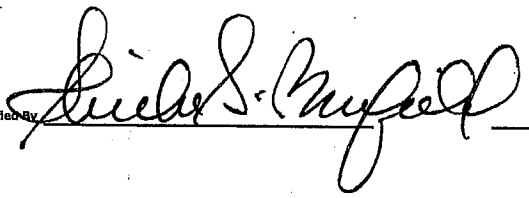
Certified By: 

Table 3 - Budgets By Appropriated Fund By CSG

CH0 - Office of Employee Appeals

Formulation Year: 2019

Comp Source Group	Approved FY 2018	FTE	Proposed FY 2019	FTE	Change from FY 2018	FTE	Explanation of Change/Note
LOCAL FUND							
0011 - REGULAR PAY - CONT FULL TIME	1,348,899	14	1,361,507	14	12,608	-	Increased due to salary adjustment/step increase in FY 2018
0012 - REGULAR PAY - OTHER	106,529	1	106,529	1	0	-	
0013 - ADDITIONAL GROSS PAY	0		0		0		
0014 - FRINGE BENEFITS - CURR PERSONNEL	298,363		300,947		2,585		Increased due to salary adjustment/step increase in FY 2018
PERSONNEL SERVICES	**1,753,790**	**15**	**1,768,983**	**15**	**15,193**	-	
0020 - SUPPLIES AND MATERIALS	3,245		3,000		(245)		
0040 - OTHER SERVICES AND CHARGES	327,000		83,824		(243,176)		Decrease due to elimination of one-time funding
0041 - CONTRACTUAL SERVICES - OTHER	40,000		30,000		(10,000)		Budget based on current spending estimates
0070 - EQUIPMENT & EQUIPMENT RENTAL	5,000		1,000		(4,000)		Budget based on current spending estimates
NON-PERSONNEL SERVICES	**375,245**		**117,824**		**(257,421)**		
LOCAL FUND	**2,129,035**	**15**	**1,886,807**	**15**	**(242,228)**	-	
Grand Total	**2,129,035**	**15**	**1,886,807**	**15**	**(242,228)**	-	

Table 4 - Budgets By Program By Activity

Agency CH0 - Office of Employee Appeals

Formulation Year: 2019 Appr Fund: 0100

Program/Activity	Approved FY 2018	FTE	Proposed FY 2019	FTE	Change from FY 2018	FTE	Explanation of Change/Note
1000 - AGENCY MANAGEMENT PROGRAM							
1020-CONTRACTING & PROCUREMENT	0	0.0	116,824	0.0	116,824	0.0	
1040-INFORMATION TECHNOLOGY	73,212	1.0	74,212	1.0	1,000	0.0	Increase due to realignement/transfer of technology related costs from Adjudication program Activity-2002
1085-CUSTOMER SERVICE	55,812	1.0	55,812	1.0	0	0.0	
1090-PERFORMANCE MANAGEMENT	248,729	2.0	256,743	2.0	8,013	0.0	Increased due to staff salary adjustment
1100-OFFICE OF EMPLOYEE APPEALS	612,130	5.0	611,856	5.0	-274	0.0	
Subtotal (1000) Agency Management	**989,883**	**9.0**	**1,115,447**	**9.0**	**125,563**	**0.0**	
2000 - ADJUDICATION							
2001-ADJUDICATION PROCESS	700,647	5.5	708,101	5.5	7,453	0.0	Increased due to salary adjustment/step increase
2002-APPEALS	375,245	0.0	0	0.0	-375,245	0.0	Increase due to realignement/transfer out NPS costs to AMP (Activity 1020 & 1040)
2003-MEDIATION	63,259	0.5	63,259	0.5	0	0.0	
Subtotal (2000) Adjudication	**1,139,152**	**6.0**	**771,360**	**6.0**	**-367,791**	**0.0**	
Total Proposed Operating Budget	**2,129,035**	**15.0**	**1,886,807**	**15.0**	**-242,228**	**0.0**	

Office of Employee Appeals (CH0)
Fringe Rate Vs FTE

	FY 2016	FY 2017	FY 2018	FY 2019
FTE:	15.0	15.0	15.0	15.0
Year-End Balance	$60,620.49	$48,270.85		
Fringe Rate:	19.5%	20.7%	20.5%	20.5%

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

MEMORANDUM

TO: **Jenny Reed, Director, Office of Budget and Performance Management**

FROM: **Sheila G. Barfield, Esq., Executive Director**

DATE: **November 6, 2017**

SUBJECT: **FY2019 Operating Budget Submission**

The purpose of this memorandum is to provide you with the information you requested regarding the FY2019 Operating Budget of the Office of Employee Appeals (OEA).

(a) A list of all current vacant positions supported by local funds and the status of the recruitment:

The agency has no vacant positions.

(b) The vacancy savings rate included in OEA's budget submission:

None

(c) Any federal funding changes which I expect in FY 2019 and the anticipated impact on OEA's budget submission:

OEA does not receive any federal funding.

(d) Any Special Purpose Revenue changes that I expect in FY 2019 and the anticipated impact on OEA's budget submission:

OEA does not have any Special Purpose Revenue.

(e) A list of all Intra-District amounts for which OEA will be the buyer agency, and a list of all Intra-District amounts for which OEA will be the seller agency:

OEA anticipates that it will enter into an MOU with the Office of the Chief Technology Officer for the purpose of maintaining its database system and other technology. At this time, however, the cost of that service cannot be determined.

(f) Any FY2018 spending pressures:

At this time, OEA does not anticipate any spending pressures in FY 18.

(g) Any FY 18 and FY 19 Special Purpose Revenue budget authority issues:

OEA does not have any Special Purpose Revenue.

(h) Any further explanatory notes regarding OEA's budget submission:

None

Form 1A: Policy Reductions to Meet the MARC and Contingency 2% Reductions

The purpose of this form is to help the CA's Office of Budget and Finance to review:
- Reductions taken by agencies in their budget submissions for the purpose of meeting the MARC (Section One)
- Further contingency cuts that are not part of the agency's submission, but could be taken if needed (Section Two)

Please sort each table from largest to smallest dollar amount.

Agency Code	CH0
Agency Name	Office of Employee Appeals
Agency Point of Contact	Sheila G. Barfield

Note: Please add additional lines as necessary.

Section One: Impact of Budget Submission Reductions

The agency should assume that cuts listed in this section WILL likely be accepted by OBF, although all cuts will be reviewed for possible restoration.

Program	Activity	CSG	Amount	Is this activity's budget is reduced compared to FY18	FTE	Description of Budget Reduction	What is the expected operational impact of this cut including any notable impact on District residents?	If relevant, how would this cut be expected to affect a formal element of your agency's performance plan (e.g. a strategic initiative, KPI, workload measure)? How much do you estimate the measure will increase/decrease as a result?
Total			$0		0.0	Note: The total dollar amount listed to the left should equal the agency's FY19 MARC minus its FY18 approved recurring local budget.		

Section Two: Impact of Additional 2% Contingency Budget Reductions

These cuts will RARELY but occasionally be used -- typically in case of unforeseen budget challenges, beyond reductions included in submission, or in lieu of undesirable cuts listed above.

Program	Activity	CSG	Amount	Is this activity's budget is reduced compared to FY18	FTE	Description of Budget Reduction	What is the expected operational impact of this cut including any notable impact on District residents?	If relevant, how would this cut be expected to affect a formal element of your agency's performance plan (e.g. a strategic initiative, KPI, workload measure)? How much do you estimate the measure will increase/decrease as a result?
AMP-Contracting & Procurem	Court Reporting	41	$30,000	25.0	0.0	A 2% reduction would eliminate those funds allocated to court reporting services.	Court reporting services are critical to the agency's mission because it is a service that is neaded so that the agency can provide evidentiary hearings and conduct board meetings. Without court reporting services, the agency will not be able to conduct evidentiary hearings or board meetings.	A backlog of cases will then develop thereby preventing the agency from carrying out its statutory mission of adjudicating appeals filed by District government employees.
Adjudication			$7,736	$0	$1	Reduce the hours of the two part-time Administrative Judges	A reduction in the hours of these two judges will slow the rate at which appeals are assigned and reduce the number of decisions issued.	If cases are not able to be assigned in a timely manner, then decisions will not ba issued in e timely manner. A backlog of cases will then develop.
Total			$37,736		1.0	Note: The total dollar amount listed to the left should equal 2% of the agency's FY18 approved recurring local budget.		

I. REQUEST SNAPSHOT

FY 2019 LOCAL PROGRAM ENHANCEMENT #1

Agency Code:	CH0
Agency Name:	Office of Employee Appeals
Enhancement Title:	Mandatory Reclassification of Administrative Judges with Compensation System Changes
Date:	November 3, 2017
Total Amount of Local Funds Requested:	Personal Services (PS) Funds: $238,327
FTEs:	Six (6)
Type of Cost:	Recurring
Agency point of contact:	Sheila G. Barfield, 727-1811
Priority of Request:	#1 out of 2 requests submitted

If the request is granted in FY 2019, then the estimated cost of this request in FY 2020 would be approximately $13,188; approximately $11,220 in FY 2021; and approximately $13,938 in FY 2022. These estimates are based upon the step increases that will become due over the next few years and the estimated fringe benefits costs.

II. RATIONALE

Problem Statement and Reasons Why This Problem Exists

The Office of Employee Appeals (OEA) is an administrative adjudicatory agency which is responsible for issuing impartial, legally sufficient, and timely decisions on appeals filed by District of Columbia government employees. A District government employee may appeal to OEA a final agency decision which has resulted in the employee being terminated from his or her position, placed on enforced leave for 10 days or more, suspended for 10 days or more, reduced in grade, or having had his or her position abolished pursuant to a reduction in force.

The taskforce involved in the District wide classification and compensation reform project has determined that all of OEA's Administrative Judges should be classified on the Legal Service pay scale. Currently, they are on the Career Service pay scale. However, due to the complex nature of the work performed by OEA's judges and the comprehensive decisions issued by them, they are more akin to an Administrative Law Judge instead of a hearing examiner as they are referred to by the statute. Therefore, all of OEA's judges should be reclassified on the Legal Service pay scale.

The Council has enacted the "Legal Service Employee Compensation System Changes Approval Resolution of 2016" which has changed the compensation system for all Legal Service employees. With the taskforce's recommendation, the resolution would impact all OEA Administrative Judges when they are moved from the Career Service to the Legal Service pay scale.

Proposed Solution

To fund the salary increase and benefit changes for each Administrative Judge, OEA will need to have its budget increased by $238,327.

III. FY 2019 MAYORAL PRIORITIES

This request does not advance the FY 2019 key Mayoral priorities. It does, however, implement legislation passed by the Council of the District of Columbia.

IV. DRAFT PROJECT PLAN

Project Owner:

Name: Sheila G. Barfield
Title: Executive Director
Email: Sheila.barfield@dc.gov
Phone: 202.727.0004

V. DRAFT PROJECT EVALUATION

Because this enhancement request pertains to the reclassification of District Government employees and a change in the compensation of those employees, there is no evidence that already supports the initiative, metrics that will demonstrate its success, or significant risk and success factors.

I. REQUEST SNAPSHOT

FY 2019 LOCAL PROGRAM ENHANCEMENT #2

Agency Code:	CH0
Agency Name:	Office of Employee Appeals
Enhancement Title:	Security of Agency Employees and Visitors
Date:	November 3, 2017
Total Amount of Local Funds Requested:	Non-Personal Services (NPS) Funds: $89,290
FTEs:	None
Type of Cost:	Recurring
Agency point of contact:	Sheila G. Barfield, 727-1811
Priority of Request:	#2 out of 2 requests submitted

The estimated cost of this request in FY 2020, FY 2021, and FY 2022 is dependent upon the hourly rate of the security officer for those years.

II. RATIONALE

Problem Statement and Reasons Why This Problem Exists

The Office of Employee Appeals (OEA) is an administrative adjudicatory agency which is responsible for issuing impartial, legally sufficient, and timely decisions on appeals filed by District of Columbia government employees. A District government employee may appeal to OEA a final agency decision which has resulted in the employee being terminated from his or her position, placed on enforced leave for 10 days or more, suspended for 10 days or more, reduced in grade, or having had his or her position abolished pursuant to a reduction in force.

The building in which the agency is located does not offer armed security guards to its tenants. Moreover, visitors to the building do not have to undergo any type of security screening. Because there is no visible security, OEA's employees, as well as visitors to the agency, would most likely be considered a "soft target" and therefore vulnerable to any kind of attack.

Proposed Solution

To hire an armed security guard, OEA will need to have its budget increased by $89,290.

III. FY 2019 MAYORAL PRIORITIES

This request does not advance the FY 2019 key Mayoral priorities. It does, however, ensure the safety and security of OEA's employees and visitors to the agency.

IV. DRAFT PROJECT PLAN

Project Owner:

Name: Sheila G. Barfield
Title: Executive Director
Email: Sheila.barfield@dc.gov
Phone: 202.727.0004

V. DRAFT PROJECT EVALUATION

Because this enhancement request pertains to the safety and security of OEA's employees and visitors to the agency, there is no evidence that already supports the initiative, metrics that will demonstrate its success, or significant risk and success factors.

FY 2017 LOCAL PROGRAM ENHANCEMENT

Agency Code:	CH0
Agency Title:	Office of Employee Appeals
Enhancement Title:	Increase to Non-Personal Services Portion of Budget
Date:	December 14, 2015
Total Amount of Local Funds:	$60,000
Is this Enhancement a one-time cost?	On-going
Agency point of contact:	Sheila G. Barfield, 727-1811

Problem Statement

The Office of Employee Appeals (OEA) is an administrative adjudicatory agency which is responsible for issuing impartial, legally sufficient, and timely decisions on appeals filed by District of Columbia government employees. A District government employee may appeal to OEA a final agency decision which has resulted in the employee being terminated from his or her position, placed on enforced leave for 10 days or more, suspended for 10 days or more, reduced in grade, or having had his or her position abolished pursuant to a reduction in force.

Evidentiary hearings are required to be held in most appeals involving an adverse action. Court reporters must be present at those hearings. It is imperative to have adequate funding to pay for court reporting services which are critical to OEA's mission. Without adequate funding, OEA's performance will be negatively impacted as its Administrative Judges will not be able to conduct evidentiary hearings thereby creating a backlog of cases.

Moreover, additional funding is needed for the purpose of hiring a contract attorney. A contract attorney will be able to process appeals and issue Initial Decisions.

Furthermore, additional funding is needed for the purpose of upgrading the agency's website. An upgrade to the website will provide to the public greater access to the agency as well as make the agency more transparent to the public.

Proposed Solution

The proposed solution is to increase the agency's non-personal services portion of its budget so that it can hire court reporters for its evidentiary hearings; hire a contract attorney to assist with issuing Initial Decisions; and upgrade its website.

Cost-Benefit Analysis

The total cost of this request is approximately $60,000. Of that amount, $12,000 would be allocated to court reporting; $12,000 would be allocated to hiring a contract attorney; and $36,000 would be allocated to upgrading the agency's website.

Legislative Analysis

No legislation, or amendments to legislation, is required.

OBP ASSESSMENT

FY2017 Budget Request

Form 1

Agency Code	CH0
Agency Name	Office of Employee Appeals
Agency Point of Contact	Sheila G. Barfield

Note: Please add additional lines as necessary.

Section One: Impact of Budget Submission Reductions Included in Budget Submission

Program	Activity	CSG	Amount	FTE	Description of Budget Reduction	Specific Impact on KPI, Performance, or other Measure
Adjudication		41	$7,593		Court reporting services will be reduced.	Fewer evidentiary hearings will be held. This will cause a backlog of cases to develop because fewer cases will be able to be adjudicated in a timely manner. The agency will not be able to issue the number of decisions it has projected to issue.
Adjudication		20	$2,800		Basic office supplies will not be purchased.	Fewer supplies will be able to be purchased thereby decreasing the efficiency of the office.
Adjudication		40	$2,980		Court reporting services, board member compensation, and other professional services will be reduced.	Fewer evidentiary hearings will be held thereby increasing the backlog of cases. The board may not be able to consider as many cases as it has in the past thereby creating a backlog at that level. Other professional services will have to be reduced thereby decreasing the efficiency of the office.
Adjudication		70	$5,090		Certain hardware and software will not be purchased.	The agency will not be able to upgrade its website thereby decreasing the public's ability to have greater access to decisions issued by the agency.
Total			$18,463	0.0		

Section Two: Impact of Additional 2% Budget Reductions, Beyond Reductions Included in Submission

Program	Activity	CSG	Amount	FTE	Description of Budget Reduction	Specific Impact on KPI, Performance, or other Measure
Adjudication		41	$1,373		Court reporting services will be further reduced.	Administrative Judges will not be able to conduct evidentiary hearings. This means that fewer cases will be issued thereby causing an even greater backlog of cases to develop. The agecy will not be able to meet its performance goals.

Program	Activity	CSG	Amount	FTE	Description of Budget Reduction	Specific Impact on KPI, Performance, or other Measure
Total			$1,373	0.0		

FY2017 Budget Request

Form 1

Agency Code	CH0
Agency Name	Office of Employee Appeals
Agency Point of Contact	Sheila G. Barfield

Note: Please add additional lines as necessary.

Section One: Impact of Budget Submission Reductions Included in Budget Submission

Program	Activity	CSG	Amount	FTE	Description of Budget Reduction	Specific Impact on KPI, Performance, or other Measure
Total			$0	0.0		

Section Two: Impact of Additional 2% Budget Reductions, Beyond Reductions Included in Submission

Program	Activity	CSG	Amount	FTE	Description of Budget Reduction	Specific Impact on KPI, Performance, or other Measure
Adjudication		12	$35,909		Reduce the hours of two Administrative Judges	A reduction in the hours of two Administrative Judges will mean that fewer cases will be mediated and adjudicated thereby decreasing the number of decisions which can be issued. Because fewer decisions will be issued, a backlog of cases will develop. Additionally, the timeframe in which decisions are issued will be further extended. Ultimately, this will mean that the agency will not be able to meet its performance goals with respect to the number of decisions it has projected to issue nor with respect to the projected timeframe for issuing the decisions and mediating the appeals.

Program	Activity	CSG	Amount	FTE	Description of Budget Reduction	Specific Impact on KPI, Performance, or other Measure
Total			$35,909	0.0		

Attachment 8

Office of Employee Appeals FY2017

FY2017 Performance Accountability Report

The Performance Accountability Report (PAR) measures each agency's performance for the fiscal year against the agency's performance plan and includes major accomplishments, updates on initiatives, and key performance indicators (KPIs).

Mission

The Office of Employee Appeals (OEA) is an independent agency with a mission is to adjudicate employee appeals and rendering impartial decisions with sound legal reasoning in a timely manner.

Summary of Services

In accordance with DC Official Code Â§1-606.03, the Office of Employee Appeals adjudicates the several types of personnel actions. (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

FY17 Top Accomplishments

Accomplishment	Impact on Agency	Impact on Residents
The agency's target was to complete adjudications within 12 months. The agency actually completed adjudications within a timeframe of 6 months.	By completing adjudications within a timeframe of 6 months, the agency was able to comply with its statutory mandate for issuing Initial Decisions in a timely manner.	
The agency's target for resolving Petitions for Review was set at a timeframe of 9 months. The agency actually resolved Petitions for Review within a timeframe of 8 months.	By resolving Petitions for Review within a timeframe of 8 months, the agency was able to issue its Opinions and Orders in a timelier manner.	
The agency's target for the number of Opinions and Orders it would issue was 35. The agency actually issued 51 Opinions and Orders.	By actually issuing more Opinions and Orders than the agency had targeted, the agency was able to reduce its backlog of Petitions for Review.	

2017 Strategic Objectives

Objective Number	Strategic Objective
1	Render impartial, legally sound decisions in a timely manner.
2	Streamline the adjudication process.
3	Maintain a system to allow the public to have access to all decisions rendered by the Office.
4	Create and maintain a highly efficient, transparent and responsive District government.**

2017 Key Performance Indicators

Measure	Freq	Target	Q1	Q2	Q3	Q4	FY	KPI	Explanation

							2017	Status	
1 - Render impartial, legally sound decisions in a timely manner. (5 Measures)									
Number of Initial Decisions Issued	Quarterly	160	46	34	35	27	142	Unmet	This target could not be met because one of the Senior Administrative Judges was on leave for most of the fiscal year.
Number of Opinions and Orders Issued	Quarterly	35	1	17	21	12	51	Met	
Time Required to Complete Adjudications	Annually	12	Annual Measure	Annual Measure	Annual Measure	Annual Measure	6	Met	
Time Required to Resolve Petitions for Review	Annually	9	Annual Measure	Annual Measure	Annual Measure	Annual Measure	8	Met	
Percent of OEA decisions upheld by D.C. Superior Court and the D.C. Court of Appeals	Annually	99%	Annual Measure	Annual Measure	Annual Measure	Annual Measure	93.1%	Nearly Met	There were no barriers to meeting this target. Because the court system is a neutral adjudicatory body, the outcome of its review and rulings on cases appealed to it cannot be predicted. The agency does, however, strive to issue decisions which can withstand judicial scrutiny.

We've revisited a project to standardize District wide measures for the Objective "Create and maintain a highly efficient, transparent and responsive District government." New measures will be tracked in FY18 and FY19 and published starting in the FY19 Performance Plan.

2017 Workload Measures

Measure	Freq	Q1	Q2	Q3	Q4	FY 2017
1 - Render impartial, legally sound decisions in a timely manner. (4 Measures)						
Percent of Cases Reversing Agency Decisions	Annually	Annual Measure	Annual Measure	Annual Measure	Annual Measure	6.2%
Number of Petitions for Appeal Filed	Annually	Annual Measure	Annual Measure	Annual Measure	Annual Measure	97
Number of Superior Court case filings	Quarterly	6	6	8	7	27
Number of Petitions for Review filed	Quarterly	8	14	6	2	30
2 - Streamline the adjudication process. (1 Measure)						
Mediate all attorney fees and compliance matters.	Quarterly	6	4	3	2	15

2017 Strategic Initiatives

Title	Description	Complete	Status Update	Explanation

		to Date		
ADJUDICATION PROCESS (1 Strategic Initiative)				
Timely Decisions	Develop a system whereby decisions which have been remanded to the Office can be prioritized and processed in a timely manner.	Complete	As soon as the Office is notified that an appeal has been remanded to the Office, the judge handling that appeal is immediately notified and instructed to prioritize the appeal.	
CUSTOMER SERVICE (2 Strategic initiatives)				
Maintain a system to allow the public to have the access to all decisions rendered by the Office	Upgrade website to create a subject matter search feature.	Complete	This initiative was completed.	
Adjudication Process	Mediate all attorney fees and compliance matters. Create uniform orders for pre-hearing conferences, evidentiary hearings, good cause matters, jurisdiction matters, and brief submissions.	75-99%	Uniform orders which are suitable for using during the various stages of the adjudication process will be drafted.	Uniform orders were not created for all of the various proceedings within the adjudicatory process. Some administrative judges prefer to use orders which they have drafted that are better suited to the appeal.

Attachment 9

Office of Employee Appeals FY2018

Agency Office of Employee Appeals **Agency Acronym** OEA **Agency Code** CH0

To edit agency and POC information press your agency name (underlined and in blue above).

Agency Performance POCs Lasheka (OEA) Brown; Sheila (OEA) Barfield **Agency Budget POCs** Shilonda (OFRM) Wiggins **Fiscal Year** 2018

When you believe you are finished with this phase of your Performance Plan, press edit in the upper right, check this box, and then press save.

2018 Objectives

Strategic Objectives

Objective Number	Strategic Objective	# of Measures	# of Operations
1	Render impartial, legally sound decisions in a timely manner.	6	3
2	Streamline the adjudication process.	2	1
3	Maintain a system to allow the public to have access to all decisions rendered by the Office.	2	1
4	Create and maintain a highly efficient, transparent and responsive District government.**	9	0
TOT		**19**	**5**

Add Strategic Objective

2018 Key Performance Indicators

Key Performance Indicators

Measure	New Measure/ Benchmark Year	Directionality	FY 2014 Actual	FY 2015 Target	FY 2015 Actual	FY 2016 Target	FY 2016 Actual	FY 2017 Target	FY 2017 Actual	FY 2018 Target	FY 2018 Quarter 1
1 - Render impartial, legally sound decisions in a timely manner. (6 Measures)											
Number of Opinions and Orders Issued	☐	Up is Better	34	25	35	25	59	35	51	25	8
Time Required to Complete Adjudications	☐	Down is Better	14	12	11	12	8	12	6	12	Annual Measure
Time Required to Resolve Petitions for Review	☐	Down is Better	9	9	9	9	11	9	8	9	Annual Measure
Percent of OEA decisions upheld by D.C. Superior Court and the D.C. Court of Appeals	☐	Up is Better	92.9%	99%	100%	99%	81%	99%	93.1%	99%	Annual Measure
Number of Initial Decisions Issued	☐	Up is Better	336	250	254	250	165	160	142	150	23
Percent of cases reversing agency decisions	☐	Neutral	6.8%	Not available	10.7%	Not available	9.8%	Waiting on Data	6.8%	Waiting on Data	Semi-Annual Measure
2 - Streamline the adjudication process. (2 Measures)											
Percent of appeals involved in mediation process	✔	Neutral	Not available	Not available	Not available	Not available	Not Available	New Measure	New Measure	Waiting on Data	Needs Data Update
	✔	Neutral									

Measure	New Measure/ Benchmark Year	Directionality	FY 2014 Actual	FY 2015 Target	FY 2015 Actual	FY 2016 Target	FY 2016 Actual	FY 2017 Target	FY 2017 Actual	FY 2018 Target	FY 2018 Quarter 1
Percent of appeals resolved through mediation			Not available	Not available	Not available	Not available	Not Available	New Measure	New Measure	Waiting on Data	Needs Data Update
3 - Maintain a system to allow the public to have access to all decisions rendered by the Office. (2 Measures)											
Percent of Initial Decisions uploaded to website	✔	Neutral	Not available	Not available	Not available	Not available	Not Available	New Measure	New Measure	100%	Needs Data Update
Percent of Opinions and Orders uploaded to website	✔	Neutral	Not available	Not available	Not available	Not available	Not Available	New Measure	New Measure	100%	Needs Data Update

We've revisited a project to standardize District wide measures for the Objective "Create and maintain a highly efficient, transparent and responsive District government." New measures will be tracked in FY18 and FY19 and published starting in the FY19 Performance Plan.

2018 Operations

Operations

Operations Header	Operations Title	Operations Description	Type of Operations	# of Measures	# of Strategic Initiatives
1 - Render impartial, legally sound decisions in a timely manner. (3 Activities)					
ADJUDICATION PROCESS	Petitions for Appeal	Intake Coordinator reviews Petition for Appeal, determines the type of appeal and assigns to Administrative Judge	Daily Service	0	0
APPEALS	Petitions for Review	Office of the General Counsel reviews Petitions for Review, drafts the Opinion and Order and meets with the Board to present the appeal and issue the decision	Daily Service	0	0
ADJUDICATION PROCESS	Initial Decisions	Administrative Judges process Petitions for Appeal which culminate in the issuance of an Initial Decision	Daily Service	0	2
TOT				**0**	**2**
2 - Streamline the adjudication process. (1 Activity)					
MEDIATION	Track mediation of attorney fee appeals	Develop a system to track mediation of attorney fee appeals to include how many attorney fee cases went through mediation, how long was the mediation process, and what was the outcome	Key Project	1	0
TOT				**1**	**0**
3 - Maintain a system to allow the public to have access to all decisions rendered by the Office. (1 Activity)					
INFORMATION TECHNOLOGY	Website	Decisions are uploaded to the agency's website so that the public is able to view the decisions and research the decisions	Daily Service	0	0
TOT				**0**	**0**
TOT				**1**	**2**

2018 Workload Measures

Workload Measures - Operations

Measure	New Measure/ Benchmark Year	Numerator Title	Units	FY 2014	FY 2015	FY 2016	FY 2017 Actual	FY 2018 Quarter 1
2 - Track mediation of attorney fee appeals (1 Measure)								
Number of attorney fee appeals mediated	☐	Number of attorney fee appeals mediated	Number of mediations			Not Available	15	Needs Data Update

2018 Initiatives

Strategic Initiatives

Strategic Initiative Title	Strategic Initiative Description	Proposed Completion Date
Initial Decisions (2 Strategic initiatives)		
Amend Rules of Procedure	Conduct a thorough review of office's rules of procedure to ensure that they provide clear guidance on adjudicating appeals before agency.	09-30-2018
Extensions of Time	Develop a system to track how many motions for extensions of time are filed; at what stage in the process are they most often filed; which party most often makes the request; how much additional time is requested; and what is the ruling of the judge.	09-30-2018

2018 Initiative Updates

Initiative Updates

Strategic Initiative Title	Initiative Status Update	% Complete to date	Confidence in completion by end of fiscal year (9/30)?	Status of Impact	Explanation of Impact	Supporting Data	Quarters
No initiative updates found							

Administrative Information

FY Performance Plan Office of Employee Appeals FY2018 **Record ID#** 440

Performance Plan ID 314

Created on Dec. 15, 2016 at 3:17 PM (EST). Last updated by Katz, Lia (EOM) on June 6, 2017 5:49 PM at 5:49 PM (EDT). Owned by Katz, Lia (EOM).

Attachment 10

Agency Name

Office of Employee Appeals

Annual Freedom of Information Act Report for Fiscal Year 2017
October 1, 2016 through September 30, 2017

FOIA Officer Reporting Sheila G. Barfield

PROCESSING OF FOIA REQUESTS

1. Number of FOIA requests received during reporting period 2
2. Number of FOIA requests pending on October 1, 2016..... 0
3. Number of FOIA requests pending on September 30, 2017..... 0
4. The average number of days unfilled requests have been pending before each public body as of September 30, 2017 0

DISPOSITION OF FOIA REQUESTS

5. Number of requests granted, in whole..... 2
6. Number of requests granted, in part, denied, in part..... 0
7. Number of requests denied, in whole..... 0
8. Number of requests withdrawn..... 0
9. Number of requests referred or forwarded to other public bodies..... 0
10. Other disposition ..... n/a

NUMBER OF REQUESTS THAT RELIED UPON EACH FOIA EXEMPTION

11. Exemption 1 - D.C. Official Code § 2-534(a)(1)..... 0
12. Exemption 2 - D.C. Official Code § 2-534(a)(2)..... 0
13. Exemption 3 - D.C. Official Code § 2-534(a)(3)
    - Subcategory (A)..... 0
    - Subcategory (B)..... 0
    - Subcategory (C) 0
    - Subcategory (D) 0
    - Subcategory (E) 0
    - Subcategory (F) 0
14. Exemption 4 - D.C. Official Code § 2-534(a)(4) 0
15. Exemption 5 - D.C. Official Code § 2-534(a)(5)..... 0

16. Exemption 6 - D.C. Official Code § 2-534(a)(6)

Subcategory (A)..... 0

Subcategory (B)..... 0

17. Exemption 7 - D.C. Official Code § 2-534(a)(7)..... 0

18. Exemption 8 - D.C. Official Code § 2-534(a)(8)..... 0

19. Exemption 9 - D.C. Official Code § 2-534(a)(9)..... 0

20. Exemption 10 - D.C. Official Code § 2-534(a)(10)..... 0

21. Exemption 11 - D.C. Official Code § 2-534(a)(11)..... 0

22. Exemption 12 - D.C. Official Code § 2-534(a)(12)..... 0

TIME-FRAMES FOR PROCESSING FOIA REQUESTS

23. Number of FOIA requests processed within 15 days..... 2

24. Number of FOIA requests processed between 16 and 25 days..... 0

25. Number of FOIA requests processed in 26 days or more..... 0

26. Median number of days to process FOIA Requests..... 15

RESOURCES ALLOCATED TO PROCESSING FOIA REQUESTS

27. Number of staff hours devoted to processing FOIA requests..... 20

28. Total dollar amount expended by public body for processing FOIA requests.....

FEES FOR PROCESSING FOIA REQUESTS

29. Total amount of fees collected by public body..... 0

PROSECUTIONS PURSUANT TO SECTION 207(d) OF THE D.C. FOIA

30. Number of employees found guilty of a misdemeanor for arbitrarily or capriciously violating any provision of the District of Columbia Freedom of Information Act 0

QUALITATIVE DESCRIPTION OR SUMMARY STATEMENT

Pursuant to section 208(a)(9) of the D.C. FOIA, provide in the space below or as an attachment, "[a] qualitative description or summary statement, and conclusions drawn from the data regarding compliance [with the provisions of the Act]."

Each FOIA request was processed in a timely manner. One of the requests was for information regarding an appeal and the other request was for information regarding each employees salary.

Attachment 11

	Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018-to-date
Number of Initial Decisions Issued	165	143	36
Number of Opinions and Orders Issued	59	51	12
Average Time to Issue Initial Decisions and Orders	7	6	4
Average Time to Issue Opinions and Orders	11	8	4
Number of Petitions for Appeal filed	103	97	25
Number of Petitions for Review filed	28	30	7
Number of Superior Court Appeals filed	24	27	3
Number of Court of Appeal Matters filed	2	2	0
Number of Pending Petitions on Appeal	25	60	23
Number of Pending Petitions on Review	0	5	7
Number of OEA Decisions Upheld	12	21	3
Number of OEA Decisions Reversed	2	2	0
Number of OEA Decisions Remanded	7	6	1

Attachment 12

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA CHILD AND FAMILY SERVICES AGENCY,	*	
	*	Civil Case No. 2014 CA 001857 P(MPA)
Petitioner,	*	Civil I, Calendar IV
	*	Judge John M. Mott
v.	*	
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,	*	
Respondent,	*	
&	*	
ERNEST HUNTER,	*	
Intervenor.	*	

ORDER

This matter comes before this court on petitioner the District of Columbia Child and Family Services Agency ("CFSA's" or "Agency's") Petition for Agency Review and *pro se* intervenor Ernest Hunter's opposition.[1] The court has received and reviewed briefs from all interested parties. For the reasons stated herein, the court reverses the decision of the District of Columbia Office of Employee Appeals ("OEA").

Background & Decisions Below

Hunter previously worked for CFSA as a Contracts Compliance Officer and was the only employee in his competitive level. On April 29, 2010, Agency Director Roque Gerald signed a memorandum addressed to the City Administrator purporting to request approval of an Administrative Order allowing the Agency to conduct a reduction-in-force ("RIF"). Then, after

[1] This court affords a "measure of leniency" to *pro se* litigants, especially when it comes to construing their legal contentions. *See Prime v. District of Columbia Dep't of Pub. Works*, 955 A.2d 178, 185 (D.C. 2008); *Flax v. Schertler*, 935 A.2d 1021, 1100 (D.C. 2007).

affording Hunter one round of lateral competition and providing him with thirty days' notice of his termination, CFSA abolished Hunter's position.

Hunter appealed his termination to OEA, where an Administrative Judge ("AJ") ordered the parties to submit legal briefs addressing whether CFSA adequately followed District of Columbia statutes, regulations, and laws in conducting the RIF and directed CFSA to produce the documentation it asserted authorized the RIF. In response, CFSA submitted the April 29, 2010 written RIF request signed by Director Gerald, which the Agency claimed authorized the RIF, and an October 23, 2000 consent order entered in an unrelated federal case, which sets forth a receivership agreement separating CFSA from the Superior Court Social Services ("the Consent Order"). The Consent Order provides, in pertinent part:

> The Child and Family Services Agency ("CFSA") shall be established as a cabinet-level agency with independent personnel authority, including full authority to hire, retain and terminate personnel consistent with District law ....

(Record at 231.)[2] Throughout the administrative proceedings, CFSA argued that this language in the Consent Order gave its Director independent authority to approve RIF actions.

On October 12, 2012, the AJ issued an Initial Decision upholding the termination. The AJ concluded that the Consent Order authorized the Agency Director to conduct the RIF without the Mayor's approval, and determined that the manner in which the RIF was conducted was in accordance with the applicable laws and regulations. Hunter then filed a Petition for Review with the OEA Board ("the Board"), arguing that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy, among other things.

The Board determined that the AJ correctly found that the RIF was conducted in accordance with the applicable law and regulations, but found that the AJ's conclusion that the

[2] The court notes that the full Record in this case was filed in case number 2012 CA 009372 P(MPA) on March 7, 2013. The Board's decision was filed in the instant case on May 5, 2014, as a supplement to the Record.

Consent Order authorized CFSA to conduct the RIF was not supported by substantial evidence. The Board began its analysis by noting that District Personnel Regulations ("DPR") §§ 2405.4, 2406.1, and 2406.2 requires agencies under the personnel authority of the Mayor to obtain the Mayor's approval before planning or conducting a RIF by first seeking leave of the "appropriate personnel authority" and then obtaining the personnel authority's signature on an Administrative Order. The Board pointed to the fact that CFSA sent the April 29, 2010 memorandum to the City Administrator and the existence of a document on the District of Columbia Office of Human Resources' website listing CFSA as an agency under the Mayor's authority as evidence that CFSA was under the personnel authority of the Mayor.

Against this legal and factual backdrop, the Board found that no evidence existed to indicate that CFSA had complied with subsections 2406.2 and 2406.4's requirements that the Agency obtain the approval of the "appropriate personnel authority"—which the Board determined was the City Administrator—and that the Agency provide an Administrative Order authorizing the RIF to the City Administrator for his or her signature. To the contrary, the Board noted that CFSA claimed that the Consent Order gave it the power to conduct RIFs without the Mayor's leave. The Board determined that the Consent Order did not give CFSA the power to conduct RIFs without the Mayor's approval for reasons that are not pertinent to the matter currently before this court. Consequently, the Board reversed the Initial Decision.

Standard of Review

In reviewing an administrative agency decision, this court must "base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Civ. R., Agency Review R. 1 (g); *see Providence Hosp. v. District of*

Columbia Dep't of Emp't Servs., 855 A.2d 1108, 1111 (D.C. 2004) (reviewing court must affirm agency decision unless it is "'arbitrary, capricious, or otherwise not in accordance with law'") (quoting *Clark v. District of Columbia Dep't of Emp't Servs.*, 658 A.2d 1040, 1044 (D.C. 2001)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *District of Columbia Fire & Med. Servs. Dep't v. District of Columbia Office of Emp. Appeals*, 986 A.2d 419, 424 (D.C. 2010) (quoting *Hutchinson v. District of Columbia Office of Emp. Appeals*, 710 A.2d 227, 230–31 (D.C. 1998)).

Analysis

In the instant case, CFSA argues that OEA erred in concluding that it lacked authority to conduct the RIF. CFSA argued before OEA that the Consent Order was the source of its authority to conduct the RIF. CFSA appears to have changed its position in the wake of the Board's decision, however, and the Agency now asserts that it has statutory authority to conduct RIFs without mayoral approval. Specifically, the Agency claims that D.C. Code § 1-604.06 (2012 Repl.), which delineates the personnel authority for District of Columbia agencies, designates the relevant "personnel authority" as the Agency Director. Thus, CFSA argues that it was not required to obtain the Mayor's approval to conduct the RIF. Hunter responds that this court should defer to OEA's interpretation of the statutes and regulations at issue and appears to contend that CFSA should be estopped from claiming that the Consent Order grants it independent authority to conduct RIFs due to its alleged failure to raise this argument in other administrative proceedings.

The court finds that OEA's decision was clearly erroneous as a matter of law because the Director of CFSA had the authority to order the RIF without mayoral approval. D.C. Code § 1-604.06 (a) provides that "[t]he implementation of rules and regulations"—including the

regulations pertaining to RIFs[3]—"shall be undertaken by the appropriate personnel authority for the District." Generally, the "personnel authority" for all District of Columbia employees is the Mayor, but the statute carves out twenty-four exceptions to this rule. *See id.* § 1-604.06 (b). With respect to the Child and Family Services Agency, the statute is clear: "[T]he personnel authority is the Director of the Child and Family Services Agency." *Id.* § 1-604.06 (c)(17).

Under the plain language of § 1-604.06, the Director of CFSA, as CFSA's designated "personnel authority," has the power to authorize RIFs without seeking the Mayor's permission. Although Director Gerald appears to have sent the April 29, 2010 memorandum requesting the RIF to the City Administrator for approval, the court finds that Director Gerald was not required to do so and that he lawfully exercised his authority to approve the RIF himself. In light of § 1-604.06, the Board's determination that CFSA was required to obtain the City Administrator's approval to conduct the RIF is contrary to law and entitled to no deference. Accordingly, this court finds that the Board's conclusion that the RIF was not authorized by law is clearly erroneous.

Since CFSA appears to have abandoned its former argument that the Consent Order is the source of its RIF authority, the court finds that it is unnecessary to address Hunter's argument that CFSA should be estopped from asserting that the Consent Order provides it with the independent authority to conduct RIFs.

Therefore, it is this **15th** day of **April, 2016**, hereby

ORDERED that the Petition for Agency Review is **GRANTED**; and it is further

ORDERED that the District of Columbia Office of Employee Appeals Board's March 4, 2014 Opinion and Order on Petition and Review is **REVERSED**; and it is further

[3] D.C. Code § 1-604.04 (a) authorizes the Mayor to issue rules and regulations to implement the provisions of subchapter XXIV of chapter 6, title 1 of the District of Columbia Code. Subchapter XXIV governs the conduct of RIFs.

ORDERED that *District of Columbia Child and Family Services Agency v. District of Columbia Office of Employee Appeals*, case number 2014 CA 001857 P(MPA), is **CLOSED**; and it is further

ORDERED that the April 22, 2016 Status Hearing is **VACATED**.

The Honorable John M. Mott
Associate Judge
(Signed in Chambers)

COPIES TO:

Lasheka Brown, Esquire
Sonia Weil, Esquire
Via CaseFileXpress

Ernest Hunter
12033 Arcadian Shores Court
Waldorf, Maryland 20602
By First-Class Mail

Attachment 13

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

WILLIAM BARNETTE, **Petitioner,** **v.** **DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,** **Respondents.**	**Case No. 2015 CA 005216 P(MPA)** **Judge Jennifer A. Di Toro**

ORDER

This matter is before the Court on the Petition for Review of Agency Decision (the "Petition") filed by William Barnette (Mr. Barnette or "Petitioner") on March 7, 2014, the Answer filed by the District of Columbia Department of General Services ("DGS") (formerly the Office of Public Education Facilities Management ("OPEFM")) and the District of Columbia Office of Employee Appeals ("OEA") (together "Respondents"). For the reasons set forth below, the Court finds that the Petition shall be granted.

PROCEDURAL HISTORY

On May 11, 2010, Petitioner William Barnette ("Petitioner" or "Mr. Barnette") was issued a letter advising him that effective June 13, 2010, he would be separated from his employment as a Facilities Operations Manager with the Department of General Services ("Agency") pursuant to a reduction in force ("RIF"). *See* Agency Record (hereinafter "R") at 34. Mr. Barnette contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals ("OEA") to contest his separation. Id. On January 31, 2014, the OEA Administrative Judge ("AJ") issued an Initial Decision ("ID") upholding the Agency's action of abolishing Mr. Barnette's position through a RIF. R. 328. Mr. Barnette then appealed the ID to

the OEA Board ("Board"), which issued its Opinion and Order on June 9, 2015, denying the Petition for Review. R. 512. On July 13, 2015, Mr. Barnette filed a Petition for Review of Agency Decision under the Merit Personnel Act with this Court. A briefing schedule was issued on October 16, 2015, and on June 10, 2016, the Court heard oral argument from Plaintiff's counsel and counsel for the District of Columbia.

FACTUAL AND PROCEDURAL HISTORY

I. OEA Appeal and Initial Decision

Petitioner was employed as a Facilities Operations Manager with the Department of General Services ("Agency"). On April 29, 2010, the Executive Director & Personnel Authority of the Office of Public Education Facilities Modernization ("OPEFM") issued a two-part Order, No. 2010-01 (Order) informing him that he was being separated from his position pursuant to a RIF. R. 32. In pertinent part, the Order stated that, "pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978 Emergency Amendment Act of 1991 (D.C. Act 9-65) the attached list of positions are identified as excess positions." *Id.* That part of the Order was signed by Mr. Allen Lew, Executive Director of OPEFM. *Id.* The Order included a second part, also signed by Mr. Lew, which stated, "APPROVAL. The positions listed are determined to be excess positions. This determination constitutes authorization to conduct a modified reduction in force." *Id.* The positions identified as "excess positions scheduled for abolishment" included the position held by Mr. Barnette. R. 33. The grade level of the position was listed as 16. *Id.* The competitive level of the position was identified as "Facilities Operations Manager;" the job series was identified as 1601. R. 40. Only one person encumbered a position in that competitive level, namely, Mr. Barnette. R. 41. On May 11, 2010, the Agency issued a notice informing Petitioner that he was being separated from his position pursuant to the RIF. The effective date of the RIF

was June 13, 2010. Petition for Appeal at 6 (July 13, 2010). Mr. Barnette contested the RIF action and appealed to the Office of Employee Appeals ("OEA") on July 13, 2010. He argued that the Agency did not properly conduct the RIF. The Agency responded that a budgetary crisis had forced it to abolish twenty-three positions. Agency Answer at 1 (August 18, 2010). The Agency contended that it had followed the RIF regulations as defined in Chapter 24 of the District Personnel Manual ("DPM") and the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA") regarding a RIF based on budgetary constraints, as it had provided Mr. Barnette with one round of lateral competition and a written, thirty-day notice prior to his separation date. *Id.*

The matter was assigned to OEA Administrative Judge Stephanie Harris. Mr. Barnette argued that the Agency had failed to properly establish a lesser competitive area, failed to support its assertion that Maintenance was the proper competitive area, violated DPM § 2409, failed to provide advance thirty-day notice, failed to provide a Standard Form 52, and lacked mayoral authority to conduct the RIF. *See generally* Petitioner's Reply Brief at 5 – 16 (December 16, 2013). On January 31, 2014, Administrative Judge Harris, based on the record, upheld the RIF. She found that the procedures enumerated under D.C. Code §1-624.08 (the CMPA) were applicable to the RIF, R. 325, and that her review of the appeal was thereby limited to a determination as to whether Mr. Barnette received a written thirty-day notice prior to the effective date of his separation and whether the Agency provided one round of lateral competition within his competitive area. *Id.*, Agency Reply at 4. The AJ determined that the Agency's Retention Register was properly created in accordance with DPM §2412.2-3, that the competitive level was based on Petitioner's position of record, and that pursuant to D.C. Code §38-451(b), the Agency had independent personnel authority to establish a lesser competitive

area such that mayoral approval was not required. Initial Decision p. 7-9 (January 31, 2014). She further concluded that because Mr. Barnette was the sole employee within his competitive area, the rules pertaining to one round of lateral competition were inapplicable. Finally, the AJ found that the May 11, 2010 notice properly provided Mr. Barnette the thirty-day notice to which he was entitled, observing that as neither the Agency nor Mr. Barnette produced a hard copy of an alleged second notice, she was unable to determine whether a second, later notice, had ever been issued. *Id.*

II. OEA Board

On March 7, 2014, Mr. Barnette appealed to the OEA Board, arguing that the Initial Decision was based on an erroneous interpretation of the CMPA and the DPM and that the AJ's findings were not supported by substantial evidence and ignored material issues. *See generally* Petition for Review. The Agency responded that it had acted in accordance with D.C. Code § 1-624.08 by giving Mr. Barnette one round of lateral competition and a written thirty-day notice. Regarding Mr. Barnette's allegation that he had been issued a second, later, RIF Notice, the Agency contended that it sent Petitioner a letter on June 8, 2010 pertaining to Mr. Barnette's severance pay, but had not sent a second RIF notice. Finally, the Agency asserted that it did not require mayoral approval to conduct the RIF.

The OEA Board found that during the time of Mr. Barnette's RIF action, the Agency had independent authority over personnel matters. OEA Opinion and Order at 7. While at the time of litigation, the OPEFM had been merged into the Department of General Services, OPEFM remained in existence until September 14, 2011. Therefore, at the time of Mr. Barnette's appeal, filed July 13, 2010, the OPEFM as established by D.C. Code §38-451 was in effect. D.C. Code § 38-451 states that the OPEFM "shall have independent procurement and personnel authority [...]

the Director of OPEFM shall be the personnel authority for OPEFM and shall have authority to promulgate personnel rules and regulations . . . ." The OEA Board concluded that the plain language of §38-451 indicated that the Director did not need mayoral approval for the RIF action, because the statute did not provide any exception to the personnel actions that could be taken by the Director. OEA Op. at 8.

The OEA Board also concluded that the Agency had properly established lesser competitive areas as provided in D.C. Code §§ 624.08(f) and 2409.2 of the DPM, under which "lesser competitive areas within an agency may be established by the personnel authority," and "any lesser competitive area shall be no smaller than a major subdivision of an agency of an organizational segment that is clearly identifiable and distinguished from others in the agency in terms of mission, operation, function and staff." *Id.* at 8. The Board rejected Mr. Barnette's argument that the Agency was required to submit a written request to the mayor in order to establish competitive areas, finding that under DPM § 2409.3, "an agency head *may* request the personnel authority to establish lesser competitive areas," but is not required to do so. *Id.* at 9, n.24. (emphasis in original). The Board also concluded that the Retention Register was substantial evidence that Mr. Barnette was the only Facilities Operations Manager within the Maintenance competitive area, and thus he was not entitled to one round of lateral competition. *Id.* at 10.

Petitioner's final argument to the OEA Board was that the Agency had issued two RIF Notices and he failed to receive proper notice for the second one. The Board concurred that pursuant to DPM §§2422.1 and 2422.3, the notice requirements for RIF actions are mandatory, and the Agency had the burden to prove compliance. *Id.* at 11. The Board found that it was undisputed that the Agency personally delivered a RIF notice to the Petitioner on May 11, 2010,

listing a removal date of June 13, 2010, thirty-three days after notification of the action. *Id.* at 11; *citing* Agency's Answer p. 15-17 (August 18, 2010). The Board further found that while a letter correcting the amount of severance pay exists, that letter was not a RIF notice, but a correction to the personnel Action Form that had been sent earlier. *See id.* at n. 29. Based on all of the above, the Board denied the Petition for Review by Order issued on June 9, 2015 (Final OEA Decision).

III. Instant Petition for Review

Before this Court, Mr. Barnette argues that the decision of the OEA Board should be vacated. Petitioner argues that the Final OEA Decision should be reversed "because it failed to contain findings on each material, contested factual issue; its findings are not supported by substantial evidence in the record, and because its conclusions of law did not flow rationally from its findings." Petition for Review at 11. Petitioner contends that the Agency failed to follow the laws and regulations applicable to the abolishment of positions of employment and subsequent reductions in force, specifically the CMPA (D.C. Code § 1-624.01(c) and Chapter 24 of the DPM (DCMR Title 6B) and that therefore the OEA Decision should be reversed, the RIF vacated, and Petitioner restored to his employment and awarded back pay and attorney's fees.

LEGAL DISCUSSION

I. Standard of Review

Super. Ct. Agency Review R. 1(g) provides that the Superior Court "shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." In addition, the Court must "base its decision exclusively on the administrative record." *Id*; *see also, Dupree v. District of Columbia Office of Emp. Appeals*, 36 A.3d 826, 830 (D.C. 2011) (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 n.4 (D.C. 2006) (further citation omitted) (the Court's review

is confined "strictly to the administrative record," and the Court "must affirm the OEA's decision so long as it is supported by substantial evidence in the record and otherwise in accordance with law"). In reviewing administrative appeals, the Court of Appeals has stated that, "[t]o pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions must follow rationally from its findings." *Dupree*, 36 A.3d at 830 (quoting *Johnson v. District of Columbia Office of Emp. Appeals*, 912 A.2d 1181, 1183 (D.C. 2006) (further citation omitted). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Hutchinson v. District of Columbia Office of Emp. Appeals*, 710 A.2d 227, 230-31 (D.C. 1998) (quoting *Davis-Dodson v. District of Columbia Dep't of Employment Servs.*, 697 A.2d 1214, 1218 (D.C. 1997) (further citations omitted); *see also, Metropolitan Police Dept. v. Baker*, 564 A.2d 1155, 1159-60 (D.C. 1989) (quoting *District of Columbia General Hospital v. Office of Emp. Appeals*, 548 A.2d 70, 77 (D.C.1988) (further citation omitted) ("[E]vidence is not substantial if it is 'so highly questionable in the light of common experience and knowledge that it is unworthy of belief.").

II. Application to This Case

A. Establishment of Maintenance as a Lesser Competitive Area

Mr. Barnette contends that the OEA final decision "relied heavily upon the unsupported argument of counsel and/or self-serving records created by OPEFM," and argues that "merely because a governmental agency creates a record or completes a form does not mean it had authority to take action, especially when such action is inconsistent with statutory and regulatory requirements." Opening Brief at 3. He advances the argument that because OPEFM failed to

properly establish maintenance as a lesser competitive area within the Agency, "such failure meant that [Petitioner's] competitive level was incorrect as well, thereby rendering the Retention Register inaccurate and Barnette's resulting termination improper and erroneous." Pet. Reply Br. 4. He argues that the existence of a "unit" within an agency is not "co-extensive with the establishment of a lesser competitive area for purposes of conducting a RIF pursuant to Chapter 24 of the DPM," because DPM § 2409 does not reference preexisting position descriptions as a type of record that may be used by governmental agencies when seeking to establish a lesser competitive area. *Id.* at 5.

This Court finds that at R. 105 – 109, OPEFM concedes that no lesser competitive level at EG-16 had been formally established, that nothing had been published in the D.C. Register prior to the RIF establishing maintenance as a competitive level, and that other employees at the EG-16 level had less credible service time than Petitioner at the time of the RIF. Mr. Barnette maintains that under a properly prepared the RIF, the proper competitive area was the Agency as a whole, and the proper Retention Register would have encompassed the entire Agency. The Court finds that the Agency properly followed the requirement of Chapter 24 of the DPM by preparing the request to conduct the RIF. With respect to whether the Agency was required to seek mayoral approval prior to issuing the April 29, 2010 approval to conduct the RIF, R. 393, and the process followed in conducting the RIF, however, the Court finds that no substantial evidence exists in the record to support the conclusion of the OEA Board that the Agency had personnel authority to conduct the RIF, and that in conducting the RIF, that the Agency adhered to the requirements of the DPM. Rather, the record indicates that that while the decision to seek a lesser competitive area is discretionary, once an agency seeks to establish a lesser competitive area, it must adhere strictly to all of the requirements of DPM § 2409.3. *Id.*

In evaluating the OEA's Decision, this Court "must accord great weight to any reasonable construction by the OEA of the statute which it administers," and "may invalidate [OEA] action only if it is unsupported by substantial evidence, or if it is arbitrary, capricious, or an abuse of discretion." *Harding v. D.C. OEA, et al.*, 887 A.2d 33, 35 (D.C. 2005). The OEA Board concluded that the use of the word "may" in detailing the specific procedural requirements of DPM § 2409 governing establishment of lesser competitive areas[1] indicates that establishing a competitive area is not required, and that absent the establishment of lesser competitive areas, the competitive area is viewed as the entire agency. Rep. Br. at 7. Under DPM Chapter 24, personnel directors are permitted to create lesser competitive areas. *See* DPM § 2409.2. Indeed, there is no dispute that the decision to seek to establish a lesser competitive area is discretionary. Pet. Reply Brief at 8; DPM Sec 2409.3.

The Court concurs with Petitioner that DPM §2409.3 does not specifically reference position descriptions as a type of record that may be used to establish a lesser competitive area, and finds that the statutory interpretation urged by the Petitioner is the correct one. The text of DPM §2409.3 establishes that an agency head "may request the personnel authority to establish a lesser competitive areas within the agency by submitting a written request *which includes all of the following* . . ." DPM § 2409.3 (emphasis added). It is undisputed that the Agency did not submit a description of the proposed competitive areas, an organizational chart of the agency, or a justification for the need to establish a lesser competitive area" as required. Pet. Brief at 6; DPM § 2409.3 (a) – (c). The requirements of DPM §2409 are mandatory and once OPEFM sought to establish a lesser competitive area, it was required to comply with them. DPM § 2409 establishes that the mayor is the personnel authority of all employees of the D.C. government

[1] "An agency head my request the personnel authority to establish lesser competitive areas within the agency by submitting a written request..." DPM § 2409.3.

with two exceptions – employees of D.C. Public School and the University of the District of Columbia - and an enumerated list of agencies which does not include OPEFM. The Court also finds that the CMPA governs all employment matters including RIF's and that until OPEFM promulgated its own rules, or the mayor delegated personnel authority, the CMPA and DPA applied to OPFM employees.

Here, Petitioner offers evidence that the failure to comply with the provisions of DPM § 2409.3 prejudiced his rights in his response to the adverse action. Had the Retention Register prepared by OPEFM on May 7, 2010 for Mr. Barnette accurately listed his competitive level as encompassing the entire Agency, a person with less seniority would have been eligible for separation. The Agency's actions further demonstrate that its Executive Director believed that the procedures under the DPM were mandatory: OPEFM requested approval to conduct the RIF as required by DPM § 2406. OPEFM's own Executive Director granted its request, also pursuant to DPM § 2406. The Agency described the maintenance unit via its position description (AR 42), prepared a Retention Register (AR 41) and issued the May 11, 2010 RIF Notice (AR 5). In compliance with DPM § 2412.4, the Retention Register prepared by OPEFM on May 7, 2010 for Mr. Barnette's competitive level is identified as Facilities Operations Manager (title), 1601 series (grade). R.41. A RIF Notice was delivered to petitioner, with more than thirty days' advance notice of the termination of his employment, as required by DPM §2422. However, there is no substantial evidence in the record to support the OEA Board's conclusion that OPEFM "had independent authority over personnel matters during the time of Employee's RIF" and were not therefore required to adhere to DPM § 2490.3. This Court concludes that even if the Executive Director had broad personnel authority, he violated the mandatory provisions of DPM § 2409.3 such that the lesser competitive area in this case was *ultra virus* and must therefore be vacated.

B. **RIF Notices**

Mr. Barnette also seeks reversal of the Final OEA Decision on the grounds that "the AR established that OPEFM prepared two RIF Notices, one dated May 11, 2010 and a second dated June 1, 2010. Id. at 14, AR 266. The Agency maintains that no June 1, 2010 Notice was ever issued. DGS Brief at 14. This Court concludes that the record supports the Board's conclusion that the letter correcting Petitioner's severance pay calculations was not a second RIF Notice. On May 11, 2010, Petitioner signed an acknowledgment of receipt of the RIF notice, more than thirty days before the effective date of separation. R.5. By contrast, there is no evidence in the record that a second RIF notice was issued in June 2010; the only communication in the record is the 2010 letter regarding adjustment to Mr. Barnette's severance package. In the absence of a second RIF Notice, this Court cannot vacate the OEA finding that Petitioner had properly been given thirty days' notice after delivery of the May 11, 2010 RIF Notice.

CONCLUSION

In conclusion, the Court finds that OEA's Final Decision that OPEFM complied with the CMPA and Chapter 24 of the DPM in abolishing the Facilities Operations Manager position and terminating Mr. Barnette's employment is not supported by substantial evidence in the record. *Dupree*, 36 A.3d at 830. Specifically, the Court finds that D.C. Code § 1624.08(f) does not preclude review of an agency's establishment of lesser competitive areas; no evidence of factual evidence exists in the record that OPEFM ever sought mayoral authority to establish maintenance as a lesser competitive area, a decision subject to review by the OEA Board and this Court. The District's argument that Petitioner was the only person in the lesser competitive area and thus not entitled to one round of lateral competition fails because OPEFM failed to comply with DPM § 2409.3. Having found that the appropriate lesser competitive area was the entire

agency, and given OPFM's admission that other EG16 had less seniority than Petitioner, this Court hereby reverses the OEA Decision, vacates the RIF, and reinstates Petitioner with back pay and benefits.

Accordingly, it is this 8th day of August, 2016, hereby

ORDERED that the Petition for Review of Agency Decision is **GRANTED**.

Judge Jennifer A. Di Toro
Signed in Chambers

Electronically served via eFiling on:

Sheila Barfield, Esq.
Office of Employee Appeals

Stewart D. Fried, Esq.
Attorney for Petitioner

Vaughn Adams, Esq.
D.C. Department of General Services

Office of the Attorney General

Secretary, Government of the District of Columbia

Attachment 14

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

OMONHODION OKOJIE, **Petitioner,** **v.** **D.C. DEPARTMENT OF MENTAL HEALTH *et al.*,** **Respondent.**	**Case No. 2014 CA 000569 P(MPA)** **Judge Ramsey Johnson** **Civil Calendar 14**

ORDER

This matter comes before the Court on Petitioner's Brief, filed January 12, 2015. Petitioner is appealing an Initial Order of the Office of Employee Appeals ("OEA"), issued December 2, 2013, which dismissed Petitioner's matter for lack of jurisdiction. Respondent filed its Brief on March 25, 2015, and Petitioner filed a Reply Brief on April 27, 2015. The Court heard oral argument on the briefs on September 1, 2015. Upon consideration of the Petitioner's Brief, Respondent's Brief, Petitioner's Reply Brief, and the entire record herein, the Initial Order of the OEA is REVERSED and REMANDED.

Background

On January 28, 2010, Petitioner Omonhodion Okojie received a Notice of Proposed Adverse Action, notifying him that his employer, Respondent Department of Mental Health, was recommending him for termination for misconduct. On February 16, 2010, Petitioner signed a Designation of Representation, which authorized Edward Smith, a staff attorney with the District of Columbia Nurses' Association (the "Union"), "to act as my representative in responding to the notice of proposed removal, dated January 28, 2010." Smith submitted a reply to the notice on Petitioner's behalf on February 19, 2010.

Not having heard a response regarding Petitioner's employment status, Smith emailed the Director of the Department of Mental Health on May 6, 2010, saying the Union intended to "file this Step 4 grievance to prod the Department to conclude this matter." Also on May 6, 2010, Respondent mailed Petitioner its final decision to remove Petitioner from his job. Smith was copied on the letter. On May 21, 2010, Smith sent a second email to the Director of the Department of Mental Health, confirming the Union received Respondent's final decision and that "DCNA [the Union] maintains the Step 4 grievance." Petitioner was not copied on this email.

On June 1, 2010, Petitioner notified Smith that he'd like to file an appeal with the OEA, at which time Smith informed Petitioner that the Union had already filed a Step 4 grievance on Petitioner's behalf. At Petitioner's request, Smith emailed the Director of the Department of Mental Health that same day to "withdraw[] the Step 4 grievance." The next day, on June 2, 2010, Petitioner filed a Petition for Appeal with the OEA.

After receiving briefs and hearing from the parties as to why the OEA had jurisdiction to hear this appeal, the OEA issued its Initial Decision on December 2, 2013. The OEA found that it did not have jurisdiction because "[i]t is undisputed that a timely Step 4 grievance was filed on behalf of Employee by his representative" and that once an employee has chosen one route, he cannot then choose the other. On January 30, 2014, Petitioner filed a Petition for Review of Agency Decision.

Standard of Review

In reviewing an agency ruling, the Court must "base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial

evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Agency Rev. R. 1(g). The Court may set aside any agency findings and conclusions that are

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) Contrary to constitutional right, power, privilege, or immunity;
(C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;
(D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or
(E) Unsupported by substantial evidence in the record of the proceedings before the Court.

D.C. Code § 2-510 (a)(3).

The Court will not overturn an agency decision if the "decision flows rationally from the facts, and those facts are supported by substantial evidence on the record." *Upchurch v. D.C. Dep't of Empl. Servs.*, 783 A.2d 623, 627 (D.C. 2001). But if the question is one of law, "this court remains 'the final authority on issues of statutory construction.'" *Id.* (quoting *Genstar Stone Prods. v. D.C. Dep't. of Employment Servs.*, 777 A.2d 270, 272 (D.C. 2001)); *see also Georgetown Univ. v. D.C. Dep't. of Employment Servs.*, 862 A.2d 387, 391 (D.C. 2004) ("The agency's legal conclusions are entitled to less deference than its factual findings because of the court's legal expertise.") "Generally, this court will defer to the agency's interpretation of the statute and regulations it administers unless its interpretation is unreasonable or in contravention of the language or legislative history of the statute and/or regulations." *Georgetown*, 862 A.2d at 391 (internal citations omitted).

Discussion

I. The OEA's Jurisdiction to Hear an Appeal

An aggrieved employee who would like to contest an agency decision has two options: appeal the agency decision pursuant to D.C. Code § 1-606.03 or follow the employee's

negotiated grievance procedure. D.C. Code § 1-616.52(e). It is "in the discretion of the aggrieved employee" which path he or she chooses, but the employee cannot choose both. *Id.* "An employee shall be deemed to have exercised [his or her] option . . . at such time as the employee timely files an appeal under this section or timely files a grievance in writing . . . , whichever event occurs first." D.C. Code § 1-616.52(f).

The issue before the Court is whether the Office of Employee Appeals correctly found that it did not have jurisdiction to hear Petitioner's appeal because Petitioner had first chosen to pursue the grievance procedure. The Court finds particularly persuasive an opinion from the Federal Circuit with facts substantially similar to this case. In *Morales v. Merit Systems Protection Board*, an employee wanted to contest her termination from the Department of Justice and designated her union to represent her "in any proceedings pending before the Immigration and Naturalization Service." 823 F.2d 536, 537 (Fed. Cir. 1987). The union then sought arbitration on her behalf. *Id.* Six days later, the employee filed an appeal with the Merit Systems Protection Board ("MSPB"). *Id.* She wrote on the appeal that no one had filed a formal grievance on her behalf and said, "I do not know if the Union filed for arbitration. They have not been in contact with me." *Id.* MSPB found that it did not have jurisdiction to hear her appeal because she had designated the union to act on her behalf, and it was immaterial whether the union failed to communicate its actions with the employee. The Federal Circuit reversed, finding "there is no evidence that [the employee] requested the union to file an arbitration proceeding on her behalf; all the evidence is to the contrary." *Id.* at 539. The Federal Circuit further found that "the union's election of arbitration is void unless it is subsequently ratified by the employee." *Id.* at 538.

Here, Petitioner designated his union to act as his representative *only* "in responding to the notice of proposed removal." Petitioner never explicitly authorized the union to represent him

in later challenging his removal. Yet the union representative emailed the Director of the Department of Mental Health to initiate the grievance procedure on Petitioner's behalf. Petitioner was not copied on this email. On June 1, 2010, Petitioner informed Edward Smith, his union representative, that he'd like to appeal the removal decision. Smith informed Petitioner that Smith had already filed a grievance on his behalf. Petitioner asked Smith to withdraw the grievance, which he did the same day, and Petitioner filed an appeal the next day. Smith writes in a sworn affidavit that Petitioner "never authorized [the union] to file a grievance on his behalf in this matter."

The law plainly states that it is "in the discretion of the aggrieved employee" which path he chooses to challenge an adverse employment action. *See* D.C. Code § 1-616.52(e). The OEA decision found "[i]t is undisputed that a timely Step 4 grievance was filed on behalf of Employee by his representative. Therefore, I find that Employee was deemed to have elected to challenge the Agency action [via the grievance procedure]." This finding is unsupported by substantial evidence in the record. All evidence indicates that Petitioner had no knowledge of the grievance filed on his behalf, and he cannot be deemed to have chosen a path he knew nothing about. Additionally, there is nothing in the record to indicate he designated his union representative to challenge the removal on his behalf. There is no evidence that Petitioner himself chose to file a grievance. In fact, the evidence shows the opposite—Petitioner only expressed a desire to file an appeal, and he requested the grievance be withdrawn as soon as he heard about it. He did not choose to initiate the grievance procedure. The OEA therefore has jurisdiction to hear Petitioner's appeal, as that is the route Petitioner himself chose to take.[1]

[1] Having found that the OEA has jurisdiction to hear Petitioner's appeal, the Court need not consider Petitioner's second issue presented: "Did the OEA erroneously determine that it was 'undisputed that a timely Step 4 grievance was filed' when there is no valid or timely filed grievance in the record?" Because the Court finds Petitioner never chose to file a grievance, it does not matter whether that grievance was timely or valid.

II. Failing to Timely File an Answer

Petitioner additionally asks the Court to determine whether "the OEA erroneously ignore[d] Petitioner's argument that the OEA should have issued a default judgment against Respondent for failing to timely file an Answer to Employee's Petition for Appeal." An agency is required to file an answer within 30 days of being served the petition for appeal. D.C. Mun. Regs. tit. 6-B, § 607.2 (LexisNexis 2015). Failure to file an answer within 30 days "shall constitute a default, and the Administrative Judge may, without further notice, render an appropriate decision." *Id.* § 609.3. Here, the agency was instructed to file its answer by July 5, 2010. The answer was filed July 6, 2010.[2]

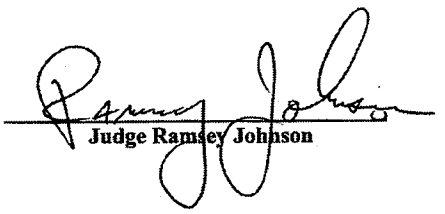
The OEA did not err in not addressing Petitioner's argument for default judgment. The OEA determined that it did not have jurisdiction to hear the appeal. "[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 434, 127 S.Ct. 1184, 1193 (2007)." It would not have been proper for the OEA to continue to decide that one of the parties was in default and award judgment to the opposing party—all for a case that the OEA believed was never properly before it in the first place. However, now that it has been determined the OEA does have jurisdiction, the OEA is free to consider Petitioner's argument on default, on which this Court takes no position.

Accordingly, it is this 30th day of October, 2015, hereby

ORDERED that the Initial Order of the Office of Employee Appeals is **REVERSED and REMANDED** for further proceedings not inconsistent with this Order.

[2] Respondent notes that July 5, 2010, was a federal holiday and the OEA was closed that day.

SO ORDERED.



Judge Ramsey Johnson

Copies to:

Camilla C. McKinney
Counsel for Petitioner

Andrea G. Comentale
Frank McDougald
Counsel for Respondent

Attachment 15

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MARY OATES WALKER,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,	:	**Case No. 2015 CA 1893 P(MPA)**
	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
Respondent,	:	
	:	
and	:	
	:	
DISTRICT OF COLUMBIA EXECUTIVE OFFICE OF THE MAYOR,	:	
	:	
Intervenor.	:	

ORDER

This matter comes before the Court upon consideration of the Petition for Review of Agency Decision (the "Petition"), filed on March 20, 2015. On August 14, 2015, Mary Oates Walker filed the Petitioner's Brief. On September 19, 2015, the District of Columbia Executive Office of the Mayor filed the Opposition Brief. On October 9, 2015, Petitioner Mary Oates Walker filed the Reply Brief.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Mary Oates Walker is the former Chief Administrative Law Judge of the District of Columbia Office of Administrative Hearings ("OAH"). (Record at 1 (hereafter cited as "R").) On January 1, 2010, then-Mayor of the District of Columbia Adrian Fenty appointed Petitioner as the Chief Administrative Law Judge of OAH for a term to last six (6) years. (R. at

378.) On February 2, 2010, the Council of the District of Columbia confirmed the Mayor's appointment of Petitioner as Chief Judge of OAH. (R. at 9 n.1.)

The instant action results from events arising out of the relocation of OAH's offices, starting in 2010. In March 2010, OAH began the initial phase of consolidating several offices into one location on the fourth floor of One Judiciary Square, NW, Washington, DC 20001. (R. at 143.) The District of Columbia Department of General Services ("DGS"), the entity that had procurement authority for OAH's relocation, awarded the relocation and moving services contract to Configuration, Inc. ("Configuration") (*Id.*) Allegedly, the initial phase of the relocation of OAH went "poorly" and OAH staff made numerous allegations criticizing the performance of Configuration and its employees. (*See id.* at 144 ("employees for Configuration did not follow instructions . . . OAH laptop computers were lost or stolen during the move").) Upon receipt of complaints and completion of the initial phase, Petitioner began efforts to procure a different company to perform the relocation of OAH. (*Id.*)

In June 2011, then-Executive Director of OAH Yohance Fuller approached then-Executive Program Manager of DGS Donald Eischens to ask if DGS would entertain TPM Group, LLC ("TPM") to perform the relocation of OAH. (*Id.* at 138.) At that time, Lincoln Tyson, the owner of TPM, was in a long-term relationship with Kiyo Oden,[1] then-General Counsel of OAH. (*Id.* at 137.) DGS selected TPM to perform the relocation of OAH without subjecting TPM to a competitive contract bidding process under the time constraints exception. (*Id.* at 138.) In July 2011, TPM began performing relocation services for OAH. (*Id.* at 137.) It is disputed whether Petitioner recommended TPM to Manager Eischens or any other member of

[1] The record reflects that Kiyo Oden's legal name has changed to "Kiyo Oden Tyson." (R. at 570.) To avoid confusion, Kiyo Oden Tyson will be referred to as "Kiyo Oden" in this Order.

DGS and whether Petitioner unduly influenced the process of awarding the relocation services contract to TPM in 2011. (*Id.* at 138.)

In February 2012, OAH began receiving inquiries and requests from a local reporter under the Freedom of Information Act ("FOIA"). (*Id.* at 9.) These FOIA requests concerned the award of the relocation of OAH services contract to TPM in 2011. (*Id.*) On June 8, 2012, WJLA-TV aired a story reporting that OAH had awarded a relocation contract to "a moving company owned by the husband of OAH's General Counsel." (*Id.*) On June 12, 2012, WJLA-TV aired a story concerning the actions of Petitioner in her official capacity as Chief Judge of OAH, which cited sources within OAH. (*Id.*)

On June 13, 2012, fifteen (15) Administrative Law Judges ("ALJs") of OAH wrote a letter to Councilmember Phil Mendelson to, *inter alia*, "express our deep reservations about Chief Judge Mary Oates-Walker . . . following an ABC News report that our agency's relocation logistics contract went to a company owned by the husband of our General Counsel, Kiyo Oden." (*Id.* at 39.) That letter also stated that the ALJs became aware that Kiyo Oden "is a friend of the Chief Judge." (*Id.*)

A series of investigations, other actions, and eventually judicial proceedings, resulted from the letter dated June 13, 2012. OAH and the District of Columbia Executive Office of the Mayor ("EOM") retained the law firm Leftwich & Ludaway to conduct an independent investigation of, *inter alia*, the allegations contained in the letter dated June 13, 2012 as against Petitioner and the awarding of the relocation contract to TPM. (*Id.* at 460-65.) On May 23, 2013, Leftwich & Ludaway issued its Report (the "L&L Report"). (*Id.* at 459.)

The L&L Report recommended, *inter alia*, that the "legitimate concerns of any ALJs regarding the performance of the Chief ALJ [Petitioner] should be addressed to the Advisory

Committee" and that Petitioner should "refer performance issues and concerns to COST," the Commission on Selection and Tenure of Administrative Law Judges. (*Id.* at 470-71.) Several pertinent findings contained in the L&L Report include that Kiyo Oden "meets the qualifications to serve as General Counsel . . . prior [working relationship with Petitioner] does not preclude Ms. Oden [] from serving as General Counsel of OAH," "[Petitioner's] and [General Counsel's] membership in [the same business] while they were both employed OAH [] was inconsistent with the District's standards of conduct regulations," and "L&L has no opinion on whether any ALJ violated the Code of Conduct based on the facts available [concerning the public disclosure of the letter dated June 13, 2012]." (*Id.* at 495, 549.)

On May 29, 2013, the District of Columbia Office of the Inspector General ("OIG") sent a letter to then-Mayor Vincent C. Gray stating that OIG "had completed its investigation regarding an allegation that [Petitioner] steered a contract to [TPM] and failed to disclose that Lincoln Tyson, owner, TPM, was in a long-term relationship with Kiyo Oden." (*Id.* at 137 (footnote omitted).) In that letter, OIG concluded that Petitioner "knew of the relationship between Ms. Oden and Mr. Tyson and did not disclose that information to [DGS], the procurement authority for this contract; however, the investigation did not uncover any evidence that [Petitioner] influenced or pressured the DGS to select TPM." (*Id.* (Footnote omitted.))

On June 12, 2013, Mayor Gray sent a letter to Charlotte Brookins Hudson, Chairperson of COST, stating that the Mayor was "transmitting . . . [the L&L Report] in response to allegations made by fifteen OAH Administrative Law Judges contained in a June 13, 2012 letter to the Chairman of the Council." (*Id.* at 323.) On October 16, 2013, COST passed the Resolution authorizing COST to begin "an investigation into the circumstances surrounding the June 13, 2012 letter signed by 15 OAH Administrative Law Judges." (*Id.* at 327.)

On October 23, 2013, EOM sent a letter to Chairperson Hudson and two other members of COST[2] stating, *inter alia*, that EOM "strongly urge[s] the Commission [COST] to terminate this investigation promptly." (*Id.* at 331.) On October 25, 2013, Chairperson Hudson and the two members of COST named in the letter from EOM replied by letter to EOM stating, *inter alia*, that COST "strongly disagree[s]" with EOM's position and "[e]ffective immediately, we the undersigned voting members of the COST resign." (*Id.* at 333-34.)

On February 6, 2014, the Board of Ethics and Government Accountability ("BEGA") filed the Notice of Violation against Petitioner and Kiyo Oden. *In re Mary Oates Walker and Kiyo Oden Tyson*, Case No. 1060-001; (*Id.* at 570.) The Notice of Violation alleges, *inter alia*, that Petitioner violated the Conflicts of Interest provision of the District of Columbia Code § 1-1162.23(a),[3] and numerous other regulations concerning self-dealing and other improper conduct. (R. at 579-96.) On February 7, 2014, EOM sent a letter to Petitioner stating that pursuant to "[D.C. Code] § 2-1831.04(7)[4] . . . this is a fifteen (15) day advance notice of a

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[2] The Honorable Gregory E. Jackson, Associate Judge of the Superior Court of the District of Columbia, is named in the letter from EOM dated October 23, 2013.

[3] D.C. Code § 1-1162.23(a) reads:

> (a) No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

[4] D.C. Code § 2-1831.04(b)(7) states that the Chief Judge of OAH is "[n]ot [to be] subject to removal from office before expiration of his or her term, except upon a written finding of the Mayor of good cause, subject to the right of appeal."

proposal to remove you [Mary Oates Walker], for good cause, from your position as Chief Judge of [OAH]." (*Id.* at 597.)

On February 20, 2014, Petitioner, through counsel, sent to Mayor Gray her response to EOM's letter dated February 7, 2014. (*Id.* at 72.) In that letter, Petitioner requested that the Mayor "reconsider [the] 'decision' in light of the facts presented above and allow Chief Judge Walker the opportunity to defend herself before an appropriate forum." (*Id.* at 92.)

Contemporaneous with these events, on February 18, 2014, Petitioner filed a civil action in the Superior Court of the District of Columbia seeking: (1) a declaratory judgment and injunctive relief "enjoining BEGA from continuing with its enforcement action;" (2) "[d]eclaring that Mayor Gray and OAH Interim Chief ALJ Tucker cannot act on and in reliance of BEGA's enforcement action to terminate or affect [Petitioner's] employment;" and (3) fully reinstating Petitioner as Chief Judge of OAH. (Compl., *Mary Oates Walker, et al., v. The District of Columbia*, 2014 CA 918 B, at 11-12.) On March 10, 2014, the Court entered the Order granting Petitioner's Motion for Preliminary Injunction and, *inter alia*, enjoining Mayor Gray from removing or terminating Petitioner as Chief Administrative Law Judge of OAH. (Order Mar. 10, 2014 at 1-2.) That same day, the District of Columbia filed the Notice of Appeal. On July 14, 2014, on remand from the District of Columbia Court of Appeals, the Court dismissed the civil action. (Order July 14, 2014 at 13 (citing D.C. App. Order May 2, 2014 at 1).)

On February 24, 2014, Petitioner, through counsel, sent a letter to Mayor Gray requesting that Mayor Gray "stay [the] final decision on [Petitioner's] termination until the jurisdiction of BEGA is determined and its proceedings have concluded." (R. at 809.) On May 5, 2014, EOM sent a letter to counsel for Petitioner that stating that "[a] reasonable period of time has now elapsed and there has been no resolution. The purpose of this letter is to inform you that if this

matter has not been resolved by May 14, 2014, the Mayor will proceed to issue a final decision terminating [Petitioner] from her position as Chief Administrative Law Judge." (*Id.* at 811.) On May 12, 2014, counsel for Petitioner sent a letter to Mayor Gray stating, *inter alia*, that Petitioner "formally request[s] a hearing in this matter prior to your final decision on [Petitioner's] termination." (*Id.* at 813.) On May 19, 2014, EOM sent a letter to Petitioner indicating that Mayor Gray was issuing the "final decision removing [Petitioner] for good cause from [the] position as the Chief Judge of OAH [effective immediately]." (*Id.* at 814.)

On June 17, 2014, Mary Oates Walker filed the Petition for Appeal with Respondent the District of Columbia Office of Employee Appeals ("OEA") contesting OAH's decision to terminate her from her position as Chief Administrative Law Judge of OAH on May 19, 2014. *In re Mary Walker*, OEA Matter No. J-0087-14. On March 11, 2015, OEA issued the Initial Decision upholding the decision of OAH to terminate Mary Oates Walker as Chief Administrative Law Judge of OAH. (Initial Decision, OEA Matter No. J-0087-14, Mar. 11, 2015 (Dohnji, J.).) On March 20, 2015, Petitioner filed the Petition seeking review of the Initial Decision of OEA in the Superior Court of the District of Columbia. (Pet. at 1.)

II. STANDARD OF REVIEW

The Superior Court of the District of Columbia has jurisdiction to review a final decision of an agency of the District of Columbia. The Superior Court Rules of Civil Procedure, Agency Review, Rule 1(g), provides that:

> [t]his Court shall base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law.

When reviewing an agency decision on appeal, the reviewing Court inquires: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence in the record supports each finding; and (3) whether conclusions are legally sufficient to support the decision and flow rationally from the findings. *Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995) (citing *Cruz v. District of Columbia Dep't of Employment Servs.*, 633 A.2d 66, 70 (D.C. 1993)).

An agency's findings of fact and conclusions of law will be affirmed so long as they are supported by "substantial evidence" notwithstanding that there may be contrary evidence in the record. *Ferreira, supra*, 667 A.2d at 312. As explained by the Court of Appeals, "[i]t is not the function of the reviewing court to superimpose its own opinion over the findings of the agency," but only to determine whether the agency's decision is supported by substantial evidence. *DiVincenzo v. District of Columbia Police & Firefighters Ret. and Relief Bd.*, 620 A.2d 868, 871 (D.C. 1993).

Substantial evidence is more than a "mere scintilla." *DiVincenzo, supra*, 620 A.2d at 871. Substantial evidence is "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Mills v. District of Columbia Dep't of Employment Servs.*, 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. District of Columbia Dep't of Employment Servs.*, 801 A.2d 983, 985 (D.C. 2002)) (internal quotations omitted). The Court "cannot affirm an agency decision if 'we cannot confidently ascertain either the precise legal principles on which the agency relied or its underlying factual determinations.'" *Doctors Council of the District of Columbia Gen. Hosp. v. District of Columbia Pub. Emple. Rels. Board*, 914 A.2d 682, 695 (D.C. 2007) (citations omitted).

The Court "will accord great deference to an agency's interpretation of its own regulations or of the statute which it administers." *Fort Chaplin Park Assoc. v. District of Columbia Rental Hous. Comm'n*, 649 A.2d 1076, 1079 (D.C. 1994) (quoting *Columbia Realty Venutre v. District of Columbia Rental Hous. Comm'n*, 590 A.2d 1043, 1047 (D.C. 1991)).

III. ANALYSIS

Petitioner presents a threshold issue under the Due Process Clause of the Fifth Amendment of the Constitution. (Pet. Brief at 9.) This issue must be addressed prior to a review of the Initial Decision of OEA on the merits.

1. The Due Process Clause

A. As Applied to Government Employment

The Due Process Clause of the Fifth Amendment of the Constitution, incorporated to the states by the Fourteenth Amendment, states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has held that the Due Process Clause grants persons a "property right in continued employment" with a government entity and "the State [cannot] deprive them of this property without due process." *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975)) (citations omitted). The Supreme Court explains that property interests "are not created by the Constitution," rather are "created and their dimensions are defined by existing rules of understandings that stem from an independent source such as state law." *Loudermill*, 470 U.S. at 538 (citing *Roth*, 564 U.S. at 577) (citation omitted).

Here, analogous to the facts presented in *Loudermill*, a state statute "plainly creates" a property interest for the Chief Administrative Law Judge of OAH to retain his or her position.

Loudermill, 470 U.S. at 538. In *Loudermill*, the Supreme Court stated that an Ohio statute stating that civil service employees were "entitled to retain their positions 'during good behavior and efficient service,' who could not be dismissed 'except . . . for . . . misfeasance'" created that property interest. *Id.* at 538 (citing Ohio Rev. Code Ann. § 124.11 (1984)). Similarly, D.C. Code § 2-1831.04(b)(7) states that the Chief Administrative Law Judge of OAH shall "[n]ot be subject to removal from office before expiration of his or her term, except upon a written finding of the Mayor of good cause, subject to the right of appeal." Intervenor's Opposition Brief does not appear to contest this discrete issue. (*See* Opp'n Brief at 15 ("[t]he *Loudermill* holding articulates the foregoing point quite clearly.")) The question presented before this Court is whether the procedures used by the Government of the District of Columbia (the "Government") to terminate Petitioner's employment as Chief Administrative Law Judge of OAH were sufficient to satisfy the requirements of the Due Process Clause as articulated in *Loudermill* and its progeny. (Pet. Brief at 9; Opp'n Brief at 15.) Stated another way, "the question remains what process is due." *Loudermill*, 470 U.S. at 541 (citation omitted).

B. Adequacy of Pre-Termination Procedures

Once the government has conferred a property interest in public employment, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* (Citations omitted.) An "essential principle of due process" is that a deprivation of a property interest "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 542 (citations omitted). This principle requires "some kind of a hearing" prior to the "discharge of an employee who has a constitutionally protected property interest in [her] employment." *Id.* (Citations omitted). Even decisions finding no constitutional violation in termination procedures have "relied on the existence of some pretermination

opportunity to respond." *Id.* For example, the Supreme Court has found "constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits." *Id.* (Citation omitted.)

Respondent and Intervenor contend that portions of *Loudermill* establish that the Government was only required to provide Petitioner "with an opportunity to be heard," which does not require a full adversarial hearing. (Opp'n Brief at 16.) *Loudermill* states that the "pretermination 'hearing,' though necessary, need not be elaborate . . . [i]n general, 'something less] than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545 (citations omitted). The Supreme Court noted that "[u]nder state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect." *Id.*

Respondent asserts that Mayor Gray's sole use of written correspondence to conduct pre-termination procedures satisfies the pre-termination requirements of *Loudermill* and the Due Process Clause. (Opp'n Brief at 16.) This assertion has merit. The Supreme Court expressly states that the "pretermination hearing need not definitely resolve the propriety of the charge . . . an initial check against mistaken decisions." *Loudermill*, 470 U.S. at 545. The "opportunity to present reasons, *either* in person *or* in writing, why proposed action should not be taken is a fundamental due process requirement." *Id.* at 546 (emphasis added). The tenured public employee "is entitled oral *or* written notice of the charges against [her] . . . and an opportunity to present [her] side of the story." *Id.* (Emphasis added.) The Supreme Court explained that the reasoning for not requiring a full adversarial hearing or an oral hearing during pre-termination proceedings is that "[t]o require more than this prior to termination would intrude to an

unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

Here, it is sufficient that Mayor Gray gave written notice on several occasions to Petitioner of the Government's intent to terminate her employment as Chief Administrative Law Judge of OAH, presented to Petitioner the Mayor's preliminary findings, and gave Petitioner the opportunity to respond in writing. D.C. Code § 2-1831.04(b)(7); (R. at 72, 597.) However, this does not end the Court's inquiry into compliance with the Due Process Clause; by granting a property interest to Petitioner, Intervenor and Respondent also granted Petitioner certain *post-termination* rights under the Due Process Clause. *Loudermill*, 470 U.S. at 546.

C. Adequacy of Post-Termination Procedures

The Supreme Court couched its holding in *Loudermill* "on the provisions in Ohio law for a full post-termination hearing." *Id.* at 546 (emphasis added). It follows that in the instant action, the Court must apply the laws of the District of Columbia governing post-termination hearings and determine whether Respondent has satisfied those provisions. *Id.*

D.C. Code § 2-1831.04(b)(7) grants Petitioner the "right of appeal," which includes initiation of post-termination proceedings through OEA. Here, Petitioner did appeal the decision by Mayor Gray to OEA. *In re Mary Walker*, No. 1-0087-14. The District of Columbia Court of Appeals has recognized that the "regulations governing OEA hearings give the ALJ discretion to conduct an evidentiary hearing, or to decide on the record." *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011) (citing 6-B District of Columbia Municipal Regulations § 625.1-2) (footnote omitted).

Here, the ALJ decided that "an Evidentiary Hearing was not required." (Initial Decision No. J-0087-14 at 1.) Petitioner asserts that to the contrary, Due Process and *Loudermill* required

that Petitioner be granted an evidentiary hearing prior to the determination of the ALJ that Petitioner's termination would be upheld. (Reply Brief at 2-3.)

The "last word [concerning the meaning of the applicable statute] . . . is the court's, for 'the judiciary is the final authority on issues of statutory construction.'" *Doctors Council of the D.C. Gen. Hosp.*, 914 A.2d at 695 (citations omitted). *Dupree* is instructive of the courts' review of the decision of an ALJ to forego an evidentiary hearing. In *Dupree*, the Court of Appeals concluded that the ALJ *abused his discretion* by failing to conduct an evidentiary hearing where the employee contesting the Government's decision to terminate his employment "raised several issues that required clarification and could not be decided solely on the documentary evidence in the administrative record." *Dupree*, 36 A.3d at 832-833 (citing *Colton v. District of Columbia Dep't of Employment Servs.*, 484 A.2d 550, 552-53 (D.C. 1984) (remanding for further findings and allowing ALJ discretion to take further testimony and receive documentary evidence despite the fact that the ALJ had *already* conducted a hearing on the issue)) (citations omitted).

Here, the ALJ, *inter alia*, made the following findings of fact, based solely on the documentary evidence in the administrative record, in support of affirming OAH's decision to terminate her employment:

> [D]isagree with [Petitioner's] assertion [that] her relationship with [Kiyo Oden] through her business, MKM LLC – was not material and had no impact on their role at OAH, which is why the Mayor presumably did not object to her appointment of Ms. Oden as her General Counsel . . .
>
> [Petitioner] pleaded guilty to four (4) of the ethical violations listed in BEGA's Notice of Violation . . . based on the foregoing, I conclude that [OAH] had good cause to terminate [Petitioner] as her conduct threatens the integrity and efficiency of operations at [OAH], and impairs her ability to lead the agency . . .

> [D]isagree with [Petitioner's] reasoning for not disclosing that she and Ms. Oden were partners in MKM LLC to the OIG . . . find that [OAH] had good cause to remove [Petitioner] for her failure to disclose her partnership with Ms. Oden in MKM LLC during the OIG investigation . . .
>
> [C]onclude that [Petitioner's] failure to disclose the relationship between [Lincoln Tyson] and Ms. Oden was a material omission . . . the fact remains that because of this material omission by [Petitioner], no one can ever know for sure whether or not [Manager Eischens] would have disqualified TPM Group from the contract . . . [Petitioner] deprived Mr. Eischens of the opportunity to determine the level of conflict involved in awarding the contract to TPM Group . . .
>
> [F]ind that when [Petitioner] decided to recommend TPM Group as a good company to [Director Fuller], she should have also disclosed her relationship with the owner of TPM Group's then fiancée, Ms. Oden. Her failure to do is sufficient good cause for her termination . . .
>
> [Petitioner] also asserts that she truthfully testified during her deposition . . . In contrast, [OAH] argues that [Petitioner's] misrepresentations under oath during the November 26, 2013 deposition is a violation of District laws . . . [Petitioner's] conduct constitutes good cause for her termination.

(Initial Decision No. J-0087-14 at 6-8.)

Contrary to the ALJ's conclusions, the record is clear that nearly all, if not all issues presented in the OEA proceeding, are *both material and in genuine dispute*. Similar to the circumstances present in *Dupree*, the "review of the administrative record reveals that the documents submitted . . . *obfuscated* rather than clarified the material issues, rendering it very difficult to decide these issue [sic] on the record." *Dupree*, 36 A.3d at 832 (footnote omitted). For example, OIG's letter dated May 29, 2013 states, "[T]he investigation *did not uncover any evidence* that [Petitioner] influenced or pressured the DGS to select TPM." (R. at 137 (emphasis

added).) In contrast, the ALJ declared that Petitioner *did* pressure or influence the DGS hire of TPM by making a "material omission." (Initial Decision No. J-0087-14 at 7.) Similarly, OIG stated in general terms that its investigation "did not uncover any evidence . . . [that Petitioner] influenced or pressured the DGS to select TPM," while the ALJ concluded that "although [Petitioner] did not directly pressure or influence [Director Fuller] or any DGS employees to hire TPM Group, here mere mention of TPM Group to Mr. Fuller . . . may have indirectly influenced his decision to hire TPM Group." (R. at 137; *Compare* Initial Decision No. J-0087-14 at 7.)

The circumstances surrounding OAH's decision to select TPM to perform relocation services in 2011 and whether Petitioner engaged in misconduct during the course of that selection process is clearly in dispute. Mere review of the record does not provide Petitioner the opportunity to challenge and to clarify whether Due Process requirements were met. The requisite opportunity is provided by means of an evidentiary hearing that, *inter alia*, includes the sworn testimony of Manager Eischens, Director Fuller, Petitioner, and other relevant actors. *See Dupree*, 36 A.3d at 832 n.7 (stating that an evidentiary hearing is required where "interrogatory responses state that two of the retired employees elected retirement in lieu of [termination] . . . contradicted by the personnel action forms which note that only one of the three employees elected retirement").

In contrast to cases "where appellant never raised material issues, and therefore the ALJ was not aware of the need for an evidentiary hearing," Petitioner has raised material issues and introduced ample evidence to contest the conclusions by the ALJ. *Id.* at 832 (citation omitted); (R. at 72, 92.) The severity of the charges against Petitioner, the substantial conflicting record evidence, and the requirements of the Due Process Clause support a finding that it was an abuse of discretion for the ALJ to render the Initial Decision solely on the record evidence. Petitioner

must be given the "opportunity to clear her name through [an evidentiary] hearing." *Loudermill*, 470 U.S. at 546; *Dupree*, 36 A.3d at 833; (Pet. Brief at 23.)

WHEREFORE, it is this 31st day of October 2015, hereby

ORDERED, that the Initial Decision of the District of Columbia Office of Employee Appeals, *In re Mary Walker*, OEA Matter No. J-0087-14 (Mar. 11, 2015), is **VACATED**; and it is further

ORDERED, that the instant action is **REMANDED** to the District of Columbia Office of Employee Appeals for an evidentiary hearing and further proceedings consistent with this Order; and it is further

ORDERED, that the Status Hearing currently set for December 11, 2015 is **VACATED**; and it is further

ORDERED, that the parties shall appear for the **Status Hearing on June 17, 2016 at 9:30 a.m. in Courtroom 202.**

BRIAN F. HOLEMAN
JUDGE

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Attachment 16

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

SARINITA BEALE, *et al.*,	*	
	*	
Petitioners,	*	Civil Case No. 2012 CA 003434 B
	*	Consolidated with:
v.	*	Civil Case No. 2013 CA 002084 M(MPA)
	*	Calendar IV
OFFICE OF CONTRACTING AND PROCUREMENT, *et al.*,	*	Judge John M. Mott
	*	
	*	
Respondents.	*	

AMENDED OPINION[1]

This matter is before the court on petitioners Sarinita Beale ("Beale") and Judy Cofield's ("Cofield's") appeal of the District of Columbia Office of Employee Appeals' ("OEA's") initial decision rendered on February 8, 2013. The OEA upheld the petitioners' separation from respondent District of Columbia Office of Contracting and Procurement ("OCP"), pursuant to a 2009 reduction-in-force ("RIF"). In a consolidated appeal to this court, petitioners contend that an OEA Administrative Law Judge ("ALJ") improperly determined that: (1) D.C. Code § 1-624.08 applied to the RIF; (2) the design and implementation of the RIF were done in accordance with applicable laws, rules, and regulations; and (3) the OEA did not have proper jurisdiction to consider whether petitioners' reemployment rights were violated.

The court affirms OEA's determination that § 1-624.08 applied to the RIF because the conclusion is supported by substantial evidence in the record. The court likewise affirms OEA's determination that it lacked jurisdiction to consider petitioners' reemployment rights. The court finds that OEA's conclusion that the RIF was executed in accordance with the relevant laws and

[1] The Amended Opinion is issued pursuant to the court's January 12, 2016 Order granting respondent the District of Columbia's motion for reconsideration, and supersedes the original August 26, 2014 Opinion in this matter. The court has made substantive changes to the Opinion in accordance with the conclusions reached in its January 12, 2016 Order. The court has also corrected some typographical errors.

regulations is not supported by substantial evidence and remands this case to OEA for further proceedings.

History

Both petitioners were employed by the District of Columbia Government in varying capacities for approximately ten years prior to being separated pursuant to the April 2009 RIF. Petitioners filed separate appeals with the OEA on June 19, 2009, which were later consolidated. Following a four-day evidentiary hearing in May 2012, the OEA issued an initial decision on February 8, 2013, that petitioners now appeal to this court.

A. History of the RIF

In late 2008, the City Administrator's Office informed OCP senior management of a need to reduce the agency's budget for fiscal year 2010 ("FY 2010") by 15% as part of a broader city-wide budget reduction exercise. *See* R. at 4526, 5562. In response, OCP management identified fourteen positions for elimination, but was subsequently advised by the District of Columbia Department of Human Resources ("DCHR") that a such a process would need to be conducted under the auspices of a RIF. *See id* at 4538–39, 4608–09. DCHR participated in OCP's RIF process and testified that the procedures undertaken complied with relevant personnel regulations. *See id.* at 4643–45. With DCHR approval, OCP submitted a request to conduct the RIF to the City Administrator's Office on March 24, 2009, which was approved on April 3, 2009. *See id.* at 6778–80. Petitioners were informed by letters dated April 20, 2009, that they would be formally separated from their positions, effective May 22, 2009. *See id.* at 6632–33, 6486–87.

B. The OEA Initial Decision

The February 8, 2013 initial decision upheld the termination of petitioners' employment, concluding that: (1) D.C. Code § 1-624.08 was the governing statute; (2) the RIF process was designed and implemented in accordance with relevant rules, laws, and regulations; and (3) the OEA did not have jurisdiction to consider whether petitioners' reemployment rights were violated, because i) petitioners failed to adhere to agency grievance procedures prior to filing an appeal with the OEA; and ii) that D.C. Code § 1-624.08 did not require the OCP to engage in reemployment procedures. *See* R. at 6938–42.

Petitioners' Claims

Petitioners present five arguments to support the conclusion that the RIF violated relevant personnel guidelines, including: (1) the RIF was not pre-approved by DCHR; (2) OCP missed the February 1 statutory deadline to identify positions to be abolished;[2] (3) both petitioners were reassigned to positions scheduled for elimination and that DCHR subsequently mismanaged the required personnel processes; (4) the RIF was not justified because OCP did not lack funds or work; and (5) OCP violated the petitioners' reemployment rights. *See* Pet'rs' Mem. at 1–2. Respondent OCP disputes these claims, arguing that the initial decision should be affirmed because it is supported by substantial evidence and is not erroneous as a matter of law.

[2] This allegation is without merit. "If the statute is ambiguous ... we must defer to the agency's interpretation of the statutory language so long as it is reasonable." *Pannell-Pringle v. D.C. Dep't of Emp't Servs.*, 806 A.2d 209, 211 (D.C. 2002) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). The language of § 1-624.08 reads in relevant part: "[p]rior to February 1 of each fiscal year ...." DC Code § 1-624.08(b). This language suggests the deadline would be February 1, 2010, because the budget reduction at issue intended to reduce expenditures for FY 2010; a FY is from October 1 to September 31 of the following year. Therefore, respondent's filing on March 24, 2009, was ahead of the FY 2010 deadline. *See* R. at 4396–97.

Standard of Review

The District of Columbia Court of Appeals has stated that the court "must affirm an agency's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Travelers Indemn. Co. of Illinois v. District of Columbia Dep't of Emp't Servs.*, 975 A.2d 823, 826 (D.C. 2009) (citing D.C. Code § 2-510 (a)(3)(A)). "'Factual findings supported by substantial evidence on the record as a whole are binding on the reviewing court, although this court may have reached a different result based on an independent review of the record.'" *Morris v. EPA*, 975 A.2d 176, 180 (D.C. 2009) (quoting *McKinley v. D.C. Dep't of Emp't Servs.*, 696 A.2d 1377, 1383 (D.C. 1997)). Moreover, the court must "defer to an agency's interpretation of a statute or regulation it is charged with implementing if it is reasonable in light of the language of the statute (or rule), the legislative history, and judicial precedent." *Travelers*, 975 A.2d at 826.

Analysis

On appeal to the OEA, the employee has the burden of proof as to issues of jurisdiction and timeliness of filing, whereas the agency bears the burden of proof as to all other issues. *See* OEA RULE 628.1, 59 D.C.R. 2129 (March 16, 2012). Having reviewed the OEA's conclusions against the evidence in the record and relevant precedent, this court finds that the ALJ was correct in determining that (1) D.C. Code § 1-624.08 applied to the RIF at issue, but the ALJ did not provide adequate explanation nor sufficient factual basis for concluding that (2) the RIF was designed and implemented in accordance with applicable laws, rules, and regulations, and (3) the OEA did not have proper jurisdiction to consider petitioners' reemployment rights.

I. The record and relevant precedent Support the Conclusion that D.C. Code § 1-624.08 governed the RIF at issue.

The parties dispute which section of the D.C. Code governed the RIF at issue. Respondents contend that § 1-624.08, the Abolishment Act, controls because the RIF was conducted for budgetary reasons. Alternatively, petitioners maintain that OCP did not lack funds or work, so the process was governed by the general statute detailed in § 1-624.02.[3] Whereas § 1-624.02 provides numerous avenues for employees contesting termination,[4] a RIF conducted under the Abolishment Act can only be challenged if: (1) the agency failed to provide one round of lateral competition; and (2) the employee was not provided written notice thirty-days prior to the effective date of termination. *See* D.C. Code § 1-624.08(d)–(e).

Generally, § 1-624.08 applies when a RIF is authorized to balance budgets rather than address deficits. *See Washington Teachers' Union, Local # 6 v. D.C. Pub. Sch.*, 960 A.2d 1123, 1132 (D.C. 2008). This is not to suggest, however, that § 1-624.02 is no longer relevant. *See Dupree v. D.C. Off. of Emp. Appeals*, 36 A.3d 826 (D.C. 2011) (applying § 1-624.02 to an analysis of a RIF without considering whether § 1-624.08 even applied). Instead, the government can trigger the applicable statute by either stating which applies or adhering to certain procedures required by each section. *See Mezile v. D.C. Dep't of Disability Servs.*, 2010 CA 004111, slip op. at 5 (D.C. Super. Ct. Feb. 12, 2014) (determining that § 1-624.02 applied because the government followed numerous procedures required by § 1-624.02, but not § 1-624.08). If it remains unclear as to which is applicable, an administrative judge must determine which statute governed and offer justification for the decision. *See Stevens, et al. v. D.C. Dep't of Health*, 2010 CA 003345, slip op. at 6 (D.C. Super. Ct. May 12, 2010).

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[3] Implementation of a RIF under the auspices of the general statute is governed by Chapter 24 of the D.C. Personnel Manual outlined in Title 6 of the D.C. Municipal Regulations. *See* 6 D.C.M.R. §§ 2401.1, *et seq.*

[4] *See* D.C. Code § 1-624.02. Additional considerations include an employee's length of service, residency, and veteran status, amongst others.

In the present case, the record shows that the ALJ considered applicable precedent from both this court and the District of Columbia Court of Appeals, and determined that § 1-624.08 guided the analysis because it was enacted for budgetary reasons. *See* R. at 6940–41. The ALJ recognized that the process was not initiated by OCP, but, rather, was executed in response to instructions from the City Administrator's Office to reduce budgets because of a city-wide financial crisis. *See id.* at 6938. Petitioners read similar precedent to mean that RIF documentation should specifically state which section applied. *See* Pet'rs' Mem. at 23 n. 104. However, in a separate case arising out of the same RIF at issue here, the OEA determined that § 1-624.08 applied because the process was initiated to address budgetary shortages. *See Ross v. Office of Contracting and Procurement*, OEA Matter No. 2401-0133-09R11, p. 4–6 (Apr. 8, 2013).

The ALJ did not have to consider petitioners' argument that OCP lacked funds and work because the OEA does not have the authority to question budgetary decisions originating in the Mayor's office. *See Anjuwan v. D.C. Dep't of Pub. Works*, 729 A.2d 883, 885 (D.C. 1998). The ALJ acknowledged this jurisdictional limitation and, as such, deferred to the discretion of management. *See* R. at 6941–42. Furthermore, the City Administrator's Office testified that the budget reduction targets were communicated to OCP as a result of a city-wide financial crises. *See id.* at 4398, 4526, 5562. In response, senior management instructed OCP managers to identify redundancies and inefficiencies. *See id.* at 4529, 4620. Ultimately, the proposed reductions were approved by the City Administrator because of a "lack of funds." *See id.* at 6779. Given the deferential standard discussed above, coupled with the substantial evidence in the record, this court affirms the OEA's determination that § 1-624.08 governed the RIF at issue.

II. It is unclear whether OCP executed the RIF in accordance with relevant laws, procedures, and rules.

Even when § 1-624.08 applies, "non-frivolous" allegations may be considered, despite not being captured under the two narrow avenues for review noted in the statute.[5] *See Levitt v. D.C. Office of Emp. Appeals*, 869 A.2d 364, 366 (D.C. 2005) (discussing *Anjuwan*, 729 A.2d at 885–86) (acknowledging that the OEA can consider a range of evidence to determine if an agency acted in 'bad faith' in the execution of a RIF). Neither this court nor the OEA, however, is positioned to question an agency's decision to abolish particular positions under the implementation of a RIF; rather, the OEA's role is limited to determining whether the RIF processes as a whole complied with applicable personnel statutes and regulations. *See Anjuwan*, 729 A.2d at 885 (citing *Gilmore v. Bd. of Trs. of the Univ. of the District of Columbia*, 695 A.2d 1164, 1167 (D.C. 1997)).

Although the ALJ determined the RIF at issue did, in fact, adhere with relevant laws and regulations, the court is unable to determine if these conclusions were supported by sufficient evidence and not erroneous as a matter of law. For these reasons, and those detailed below, the court remands the OEA's decision so to allow such determinations to be made.

A. The OCP complied with regulations in identifying petitioners for termination.

Petitioners allege the RIF at issue violated D.C. Personnel Manual regulations because "OCP selected the people whom the managers subjectively determined to eliminate" as opposed to objectively identifying positions based on empirical analyses. Pet'rs' Mem. at 1, 6–7; *see also* Pet'rs' Reply Mem. at 3–4. In opposition, OCP senior management testified that managers were instructed to identify redundancies and inefficiencies, but were given discretion in identifying

[5] A RIF executed under § 1-624.08 largely limits an employee's ability to challenge termination to those instances where: (1) the agency failed to provide one round of lateral competition; and (2) the employee was not provided written notice thirty-days prior to the effective date. *See* D.C. Code § 1-624.08(d)–(e).

positions to be eliminated. *See* R. at 4529, 4555, 4620. None of the testifying managers could identify the process by which petitioners were recommended for termination, but they confirmed that strategies to achieve the budget reduction targets were discussed openly at management-level meetings.[6] Similarly, the City Administrator's Office testified that it is common to give agencies increased latitude when administering budget reduction exercises. *See id.* at 4481.

Petitioners suggest this indicates that agency "managers ... figured out which people they did not want at OCP," thereby supporting the conclusion that the RIF was designed to eliminate individuals, rather than positions. Pet'rs' Mem. at 4, 7. Since the OEA does not have the authority to question budgetary decisions originating in the Mayor's office, nor can it challenge an agency's decision to abolish particular positions, *see Anjuwan*, 729 A.2d at 885, the ALJ properly determined that OCP complied with regulations in identifying petitioners for termination.

B. It is unclear if the RIF process overall complied with relevant regulations.

Agencies wishing to conduct a RIF generally obtain consent first from a personnel authority, such as DCHR, before requesting final approval from the City Administrator's Office. D.C. Personnel Manual regulations provide that: "[i]f a determination is made that a reduction in personnel is to be conducted ... the agency shall submit a request to the appropriate personnel authority to conduct [the RIF]" and upon approval, "prepare ... [an] Administrative Order, or an equivalent document ... stating the reason for the RIF." 6 D.C.M.R. §§ 2406.1–2 (2012).

Petitioners argue that OCP did not comply with these procedures and others[7] that are required to conduct a *lesser competitive area* RIF.[8] Petitioners forward three arguments in

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[6] *See, e.g.*, R. at 4555, 5136, 5364–65, 5561.

[7] Chapter 24 of the D.C. Personnel Manual detailed in Title 6 of the D.C. Municipal Regulations provides guidance for agencies conducting lesser competitive area RIFs. *See* 6 D.C.M.R. § 2409.3(a)–(c), which reads in relevant part:

support, including: (1) the RIF was not pre-approved by DCHR because the documents used to justify the RIF were dated *after* those sent to the City Administrator's Office for approval; (2) petitioners were reassigned to new positions in the months preceding execution of the RIF; and (3) neither DCHR nor OCP could authenticate a document used to justify the use of a lesser competitive area RIF, which was produced two years after having been sought in discovery. *See* Pet'rs' Mem. at 8, 9 no. 34. Petitioners question the decision to allow the document to be submitted into evidence, despite the ALJ refusing to compel disclosure of metadata that petitioners believed could help identify when the document was created.

A representative of DCHR involved in the RIF testified that OCP adhered to relevant regulations because it was generally assumed that agency management operated in "good faith." *See* R. at 4686. Although he could not verify with absolute certainty that OCP followed procedure, the DCHR representative authenticated the documents submitted to evidence that allowed him to approve the use of a lesser competitive area RIF in March 2009. *See* R. at 4644, 4677. Nevertheless, the applicable D.C. Personnel Manual regulations do not indicate that DCHR approval is necessarily required: "[a]n agency head *may* request the personnel authority to establish a lesser competitive area ...." 6 D.C.M.R. § 2409.3 (emphasis added).

The ambiguity, however, involves whether OCP properly abolished petitioners' *position of record* in conducting the lesser competitive area RIF. Although decided two months after the initial decision at issue here, the OEA held that an employee can only be terminated through RIF

An agency head may request the personnel authority to establish lesser competitive areas within the agency by submitting a written request which includes all of the following:
(a) A description of the proposed competitive area or areas which includes a clearly stated mission statement, the operations, functions, and organizational segments affected;
(b) An organizational chart of the agency which identifies the proposed competitive areas; and
(c) A justification for the need to establish a lesser competitive area.

[8] A representative of DCHR testified that a "competitive area" is an "area of an ... agency in which employees who are affected by a reduction in force compete for job retention ... [and a lesser competitive area is] a smaller ... component within the agency, such as a division." R. at 4631. Creating a "lesser competitive area" limits an employee's retention rights to smaller divisions within the agency, as opposed to the agency overall.

proceedings from their position of record and related competitive area; more simply put, an employee cannot be "RIF'd from a position she did not formally occupy." *See Ross*, OEA Matter No. 2401-0133-09R11 at 7–8. The OEA is required to make this determination based on the employee's Notification of Personnel Action form, or "Form 50." *See id.* at 7. Other such documentation indicating an employee's reassignment, such as Notice of Reassignment memos or e-mail conversations, are insufficient. *See id.* If the position of record and corresponding competitive area stated on the Form 50 differ from what was used to create the lesser competitive area and identified on the approvals documents sent to the City Administrator's Office, then the OEA has held that an employee's termination was erroneous by default. *See id.* at 7–8; *see also* 6 D.C.M.R. § 2410.2 ("Assignment to a competitive level shall be based upon the employee's position of record.").

Here, the court is unable to determine from the record if petitioners were properly separated from their respective position of record, as both were reassigned in the months preceding the RIF. Beale was reassigned to a Program Analyst position on February 1, 2009, whereas Cofield was assigned to the "Goods Unit" in January 2009, before being shifted back to her original position on March 15, 2009. *See* R. at 6452, 6625, 6629. Beale's "Form 50" identifies her February 2009 reassignment to OCP as a whole, without identifying any particular subdivision. *See id.* at 6452. However, the justification documents used by DCHR in creating the lesser competitive area identified Beale's position as being located in the "Procurement Support" subdivision of OCP. *See id.* at 6322. Similarly, Beale's RIF notice identifies "Procurement Support" as her position's competitive area. *See id.* at 6486.

In *Ross*, the OEA held that a "Form 50" which listed an employee's position of record as "Program Analyst (Business Operations)" in the competitive area of OCP as a whole was

sufficiently different from the RIF notice sent to the employee, which identified the competitive area as the "Office of Procurement Integrity Compliance," a subdivision of OCP. OEA Matter No. 2401-0133-09R11 at 7. This deficiency allowed the OEA to conclude that petitioner was separated from a position they did not formally occupy, thereby constituting a "harmful error" that required reinstatement. *See id.* at 7.

A similar discrepancy seems to apply to petitioner Cofield. On January 28, 2009, petitioner was reassigned to the "Office of Contracting and Procurement (OCP), Goods Unit," indicated in the record by a Notice of Reassignment memo. *See* R. at 6625. On March 15, 2009, petitioner was transferred back to her original position with the OCP's District of Columbia Supply Schedule ("DCSS"). *See id.* at 6630. The only evidence in the record of petitioner's reassignment back to DCSS is an e-mail from an individual in human resources to petitioner's manager, noting that she had updated petitioner's status in the internal human resources software, effective March 15, 2009. *See id.* The March 2009 documents used to justify the lesser competitive area RIF sent to DCHR and the City Administrator's Office list petitioner's competitive area as the "Office of the Assistant Director for Procurement" – the position petitioner held while reassigned between January 28 and March 15, 2009. *See id.* at 6321, 6324. Similarly, the RIF Notice sent to petitioner on April 20, 2009, lists the position's competitive area as "Office of the Assistant Director for Procurement," although petitioner had been transferred back to her prior position with DCSS at the time the RIF was approved on March 24, 2009. *See id.* at 6632.

Unfortunately, a copy of petitioner Cofield's "Form 50" was never submitted into evidence, thereby preventing the OEA from properly determining, and this court reviewing, whether petitioner's position of record and competitive area were properly terminated.

Therefore, the OEA's conclusion that the RIF at issue was conducted in accordance with relevant regulations does not appear to be supported by substantial evidence in the record and may be erroneous as a matter of law.

III. The OEA correctly concluded that it lacked jurisdiction to consider petitioners' claims that OCP violated their reemployment rights.

Petitioners' allege that OCP violated their reemployment rights[9] by subsequently hiring two individuals while the RIF at issue was being executed. *See* Pet'rs' Mem. at 2; Pet'rs' Reply Mem. at 9–11. The ALJ's decision does not address petitioners' reemployment arguments because the ALJ determined that RIFs conducted under the auspices of § 1-624.08 do not "require an agency to engage in priority re-employment procedures." R. at 6941. However, § 1-624.08 also states that "[s]eparation pursuant to this section shall not affect an employee's rights under either the Agency Reemployment Priority Program or the Displaced Employee Program established pursuant to Chapter 24 of the District Personnel Manual." D.C. Code § 1-624.08(h).

Moreover, the ALJ relied on testimony from a former DCHR employee who believed that employees claiming such violations must first file a grievance with their respective agency, an area the ALJ believed was outside of OEA's purview to adjudicate. *See* R. at 5714–5716, 6941. Section 16 of the D.C. Personnel Manual, discussed by the DCHR employee in testimony and referred to by the ALJ in the initial decision, however, states that "[an] employee is authorized ... at his or her discretion, to ... [a]ppeal to the [OEA] or file a disciplinary grievance."[10] 6

[9] Section 2428.1 of the D.C. Personnel Manual reads in relevant part: "When a qualified person is available on the agency reemployment priority list, including a lesser competitive area reemployment priority list ... [a] position within the competitive area shall not be filled ... by ... [a] new appointment ...." 6 D.C.M.R. § 2428.1(a) (2012).
[10] Section 1601.3 states in full: "If an employee is authorized to choose between the negotiated grievance process set forth in a collective bargaining agreement and the grievance or appellate process provided in these rules, the employee may elect, at his or her discretion, to do one (1) of the following: (a) Grieve through the negotiated grievance procedure; or (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules." 6 D.C.M.R. § 1601.3 (2012).

D.C.M.R. § 1601.3 (2012).[11] Furthermore, other language in the D.C. Personnel Manual seems to indicate that filing a grievance with an agency is not compulsory, as it states that an employee "*may* file a grievance with an agency or personnel authority ...." 6 D.C.M.R. § 845.1 (emphasis added).

Finally, the ALJ noted in the initial decision that the OEA no longer has jurisdiction over grievance appeals. *See* R. at 6942. The ALJ's decision was correct in this regard. An employee separated pursuant to an Abolishment Act RIF may only raise two issues before the OEA: whether the employee received one round of competition as guaranteed by § 1-624.08 (d); and whether the employee received a thirty day notice of the RIF pursuant to § 1-624.08 (e). D.C. Code § 1-624.08 (f); *Washington Teachers' Union, Local No. 6 v. D.C. Pub. Schs.*, 960 A.2d 1123, 1133 (D.C. 2006); *Mezile*, Mem. Op. & J. at 6. Accordingly, the court affirms this aspect of OEA's decision.

Therefore, it is this **12th** day of **January, 2016**, hereby:

ORDERED that, consistent with this Opinion, the OEA's February 8, 2013 Initial Decision is **AFFIRMED** in part and **REVERSED** in part; and it is further

ORDERED that this matter is **REMANDED** to OEA for further proceedings.

The Honorable John M. Mott
Associate Judge
(Signed in Chambers)

[11] Section 16 of the D.C. Personnel Manual at §§ 1600, *et seq.*, *supra* note 9, was amended in 2012 to replace those regulations in force in 2009. However, § 1601 specifically was last amended by Final Rulemaking published at 55 D.C.R. 1775 (February 22, 2008). Therefore, § 1601.3 was in force at the time of petitioners' appeal.

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Attachment 17

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

PAULA EDMISTON, **Petitioner,** **v.** **OFFICE OF EMPLOYEE APPEALS,** **Respondent,** **METROPOLITAN POLICE DEPARTMENT,** **Respondent/Intervenor,** **FRATERNAL ORDER OF POLICE/METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,** **Intervenor.**	**2014 CA 007504 P(MPA)** **Judge Robert Okun** **Calendar 10**

ORDER

This matter is before the Court on Petitioner Paula Edmiston's ("Petitioner") Petition for Review of Agency Decision (the "Petition"), filed on September 9, 2014. Petitioner filed her Brief in support of the Petition on March 30, 2015. Petitioner then filed a Supplemental Petition for Review of Petition (the "Supplemental Petition") on August 16, 2015. Intervenor Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") filed its Brief ("FOP Brief") on October 5, 2015, in support of the Petitioner's argument to review the agency decision. The Metropolitan Police Department ("MPD") filed its Brief ("MPD Brief") in opposition to the Supplemental Petition on October 5, 2015. Petitioner filed her Reply to the FOP Brief and MPD Brief on October 19, 2015. MPD filed a Reply Brief on October 27, 2015; this Reply is actually a sur-reply, and shall be treated as such. Finally, FOP filed a Notice of

Supplemental Authority on April 6, 2016. Upon consideration of the Petition, Supplemental Petition, the Briefs, the Replies, and the entire record, the Petition is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2006, Petitioner was a Captain in the MPD's Second District. Initial Decision on Remand ("IDR") at p. 2. On April 1, 2006, at an MPD-sponsored event, Petitioner made disrespectful comments about two individuals whom she had had confrontations with at grocery stores earlier that day. *Id.* When confronted about her statements by her superiors, Petitioner stated that it was another officer, not herself, who had made the statements. *Id.* On June 2, 2006, Petitioner was served with a proposed Notice of Adverse Action ("Notice") indicating that she would be demoted to the rank of lieutenant based on the following three charges: (1) conduct unbecoming of an officer; (2) failure to obey orders or directives; and (3) willfully and knowingly making untruthful statements. *Id.* On July 25, 2006, MPD served Petitioner with a Final Notice of Adverse Action ("Final Notice"), stating that the Petitioner was guilty of the three charges of misconduct listed in the Notice, and demoting the Petitioner to the rank of lieutenant. *Id.* The Final Notice also included information that the Petitioner could appeal to the Chief of Police, and that she could appeal the adverse action to the Office of Employee Appeals ("OEA") within thirty days of any final agency action. *Id.* at p. 3.

Petitioner appealed her demotion to the Chief of Police on August 8, 2006, requesting that she be reinstated to the rank of Captain, or that the penalty be mitigated. *Id.* On August 29, 2006, Chief of Police Charles Ramsey ("Chief Ramsey") issued a letter (the "August 2006 Letter") in which he denied the Petitioner's appeal, and recommended that the Petitioner be discharged rather than demoted based on the misconduct committed. *Id.* In addition, in the August 2006 Letter, Chief Ramsey informed the Petitioner that she could elect to have the

adverse action reviewed by a panel made up of police officers. *Id.* Petitioner elected to have such a hearing and a full evidentiary hearing took place on October 27, November 3, and November 27, 2006. *Id.* Following this hearing, the Trial Board found the Petitioner guilty of all three charges, and recommended that she be terminated. *Id.*

A second Final Notice of Adverse Action was issued on January 10, 2007, notifying Petitioner that her removal would go in effect on March 2, 2007. *Id.* Petitioner appealed this decision to Acting Chief of Police Cathy Lanier, and her appeal was denied on February 23, 2007. *Id.* at p. 4. On March 2, 2007, Petitioner was removed from her position at MPD. *Id.*

Petitioner appealed her termination to the OEA on March 7, 2007, arguing that MPD violated a provision known as the "90-Day Rule," and that Chief Ramsey did not have the authority to increase Petitioner's proposed penalty of demotion to termination. R. at 625. On April 30, 2008, Administrative Law Judge Joseph Lim (the "ALJ") issued an Initial Decision, in which he concluded that MPD did not violate the 90-Day Rule, but found that the removal was improper, and reduced the penalty from a termination back to the originally proposed penalty of demotion. R. at 625-633. Petitioner then appealed to the OEA Board on June 2, 2008, challenging ALJ Lim's decision to demote her without permitting her the opportunity to petition for a new evidentiary hearing. The OEA Board issued an Opinion and Order on Petition for Review ("Board Decision") on January 25, 2010, agreeing with ALJ Lim's reasoning for imposing the penalty of demotion.

On January 25, 2010, MPD appealed ALJ Lim's Initial Decision and the Board's Decision to the Superior Court of the District of Columbia, and on October 9, 2013, Judge Macaluso issued an Order reversing the portion of ALJ Lim's Initial Decision that set aside the Petitioner's termination. *See D.C. MPD v. OEA*, 2008 CA 004804 P(MPA) (D.C Super. Ct.

2013), Oct. 9, 2013 Order Reversing Agency Decision. In her decision, Judge Macaluso concluded that Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for the Petitioner, and remanded the case to the OEA in order for them to issue a decision consistent with her Order. *Id.* at pp. 15-16.

On August 8, 2014, ALJ Lim issued his Initial Decision on Remand ("IDR"), finding that the Agency's actions were timely, and that the Agency's decision to impose the penalty of termination was not an abuse of discretion and should be upheld. Petitioner filed her Petition to appeal the OEA's decision in this Court on September 9, 2014. IDR at pp. 4-8.

During the period of time when Petitioner committed the relevant acts, MPD General Order 1202.1 was in place, limiting the discretion of the Chief of Police when he or she reviewed appeals from a Final Notice. R. at 626. At that time, the Chief was permitted to sustain the penalty, reduce it, or remand the matter for further consideration, but was not permitted to increase the penalty. *Id.* On April 13, 2006, less than two weeks after Petitioner committed the acts at the grocery store, but prior to the commencement of any adverse action proceedings, MPD General Order 120.21 was put in place, replacing General Order 1202.1. *Id.*; *see also* MPD General Order ("GO") 120.21. Under the new GO, the Chief of Police could now modify the penalty imposed and impose a higher penalty than recommended by the Assistant Chief if the penalty was appealed to the Chief of Police. MPD GO 120.21 at VI(L)(5).

In ALJ Lim's Initial Decision, he concluded that the new GO could not be applied retroactively to Petitioner's case, as the new GO was not in place at the time of Petitioner's conduct at the grocery stores. R. at 631. However, Judge Macaluso concluded in her October 9, 2013 Order that the new GO could in fact be applied retroactively. *See D.C. MPD v. OEA*, Oct. 9, 2013 Ord. In ALJ Lim's IDR, ALJ Lim found that Chief Ramsey's decision to increase

Petitioner's penalty from demotion to termination was not contrary to law, and recited verbatim the section of the Initial Decision that addressed the 90-Day Rule. *See* IDR.

Petitioner filed her Petition and Supplemental Petition with this Court, arguing that the IDR should be reversed. In her Supplemental Petition, Petitioner specifically states that "[t]he sole issue remaining to be decided by this Court is whether the OEA decision removing Capt. Edmiston from the police force should be reversed on the ground that the removal action was commenced more than 90 business days after the MPD knew of the act or occurrence constituting cause." Supp. Pet. at p. 1. However, in its Brief, FOP argued that there are actually two issues for this Court to decide: (1) whether the 90-day rule requires that the agency decision be reversed; and (2) whether Chief Ramsey had the authority to increase Petitioner's penalty from demotion to termination. *See* FOP Br. at pp. 5-14. Following the filing of FOP's Brief, Petitioner filed her Reply, in which she adopted FOP's arguments and agreed that there were actually two issues at hand. In response, MPD filed its Sur-Reply, claiming that the question of whether Chief Ramsey properly increased Petitioner's penalty had already been decided by this Court in Judge Macaluso's Opinion. A Motion Hearing was conducted before this Court on November 23, 2015, at which time all parties presented argument and the Court took the matter under consideration. FOP subsequently filed its Notice of Supplemental Authority on April 6, 2016, informing the Court of a recent OEA decision that is relevant to the issues in this case.

DISCUSSION

I. Standard of Review

Super. Ct. Agency Review R. 1(g) provides that the Superior Court "shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." In addition, the Court must "base its decision exclusively

on the administrative record." *Id*; *see also Dupree v. District of Columbia Office of Emp. Appeals*, 36 A.3d 826, 830 (D.C. 2011) (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 n.4 (D.C. 2006) (further citation omitted) (the Court's review is confined "strictly to the administrative record," and the Court "must affirm the OEA's decision so long as it is supported by substantial evidence in the record and otherwise in accordance with law"). In reviewing administrative appeals, the Court of Appeals has stated that, "[t]o pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions must follow rationally from its findings." *Dupree*, 36 A.3d at 830 (quoting *Johnson v. District of Columbia Office of Emp. Appeals*, 912 A.2d 1181, 1183 (D.C. 2006) (further citation omitted). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Hutchinson v. District of Columbia Office of Emp. Appeals*, 710 A.2d 227, 230-31 (D.C. 1998) (quoting *Davis-Dodson v. District of Columbia Dep't of Employment Servs.*, 697 A.2d 1214, 1218 (D.C. 1997) (further citations omitted); *see also Metropolitan Police Dept. v. Baker*, 564 A.2d 1155, 1159-60 (D.C. 1989) (quoting *District of Columbia General Hospital v. Office of Emp. Appeals*, 548 A.2d 70, 77 (D.C.1988) (further citation omitted) ("[E]vidence is not substantial if it is 'so highly questionable in the light of common experience and knowledge that it is unworthy of belief.").

I. Application to This Case

Petitioner and FOP argue that there are two issues for this Court to decide: (1) whether MPD violated the 90-Day Rule when it issued the adverse action of termination against the Petitioner; and (2) whether Chief Ramsey had the authority to increase Petitioner's penalty from

demotion to termination. MPD contests the Court's authority to decide either issue, arguing that Petitioner's argument with respect to the 90-Day Rule is barred because it did not appeal ALJ Lim's decision on this issue, and that the argument with respect to Chief Ramsey's authority is barred by the law of the case doctrine. Additionally, MPD contends that the OEA's decision was supported by substantial evidence in the record. The Court will address each of these issues below.

A. The 90-Day Rule

The so called 90-Day Rule provides in relevant part:

> no corrective or adverse action against any sworn member or civilian employee of . . . the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays or legal holidays, after the date that . . . the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

D.C. Code § 5-1031(a).

MPD contends that the Court should not consider the issue of whether MPD complied with D.C. Code § 5-1031 because the Petitioner did not appeal ALJ Lim's decision on the 90-Day Rule question to the OEA Trial Board. MPD also argues that, if the Court does find that the issue is properly before it, ALJ Lim's decision was supported by substantial evidence, and should be upheld.

Because, for the reasons set forth below, the Court is remanding the matter to the OEA on a different issue, the Court need not make a determination on this issue.

B. Chief Ramsey's decision to increase Petitioner's penalty from demotion to termination

Petitioner and FOP argue that the ALJ Lim's IDR should be reversed because Chief Ramsey did not have the authority to increase Petitioner's penalty from demotion to termination because the General Order that the Chief relied upon in imposing a higher penalty is superseded

by the District of Columbia Municipal Regulations. MPD contends that the Court cannot address the merits of this issue because this is being raised for the first time before this Court, and because the law of the case doctrine applies. For the reasons stated below, the Court finds that this issue is properly before it, that the law of the case doctrine does not apply, and that the OEA's conclusion that Chief Ramsey had the authority to increase the Petitioner's penalty is not supported by the record and should be remanded.

1.Is this issue being raised for the first time before this Court?

At the November 23, 2015 Motion Hearing, MPD argued that the Petitioner and FOP were, for the first time, making the argument that MPD General Order 120.21 is superseded by 6-B DCMR § 1613.2. As such, MPD contends that it is not an issue that the Court can address. MPD is correct that this Court's role in cases arising under the Merit Personnel Act is limited to reviewing the actions and decisions of the OEA, and the Court cannot rule on an issue that was not preserved for appeal by being raised before the OEA. *See Brown v. Watts*, 993 A.2d 529, 535 (D.C.2010). However, a review of the Record shows that Petitioner previously made this same argument.

On August 17, 2007, Petitioner filed a Motion for Summary Judgment with the OEA. In this Motion, Petitioner specifically argued that that the Chief appeared to be acting under MPD General Order 120.21, but that "[t]he increase of penalty here is unlawful [ ] because the action is forbidden by the District of Columbia Municipal Regulations." R. at p. 354. This argument is identical to the one that FOP brings in its Brief and Petitioner adopts in her Reply. Additionally, MPD concedes in its own Brief that Petitioner appealed to the OEA on two grounds, one of which was "that the [Chief of Police] did not have the authority to increase the proposed penalty

of demotion to termination." MPD Br. at p. 5. As such, the argument was preserved for appeal by being raised before the OEA, and can be considered by this Court.

2.Does the law of the case doctrine prohibit the Court from making a determination with respect to this issue?

The law of the case doctrine "holds that once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court." *Kritsidimas v. Sheskin,* 411 A.2d 370, 371 (D.C. 1980). The purpose of the doctrine is to "prevent[] relitigation of the same issue in the same case by courts of coordinate jurisdiction." *Johnson v. Fairfax Village Condominium IV Unit Owners Association,* 641 A.2d 495, 503 (D.C. 1994). However, the doctrine is "discretionary," and is not controlling under all circumstances. *See United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950).

In its Sur-Reply, and at the November 23, 2015 Hearing, MPD argued that the law of the case doctrine prohibits this Court from addressing the issue of whether Chief Ramsey had the authority to increase the proposed penalty for the Petitioner. MPD contends that Judge Macaluso resolved this issue in her October 9, 2013 Order in 2008 CA 004804 P(MPA), thus, the issue cannot be relitigated. The Court disagrees that the law of the case doctrine applies to the issue raised by Petitioner and FOP.

Judge Macaluso set forth a lengthy analysis in her October 9, 2013 Order reversing ALJ Lim's Initial Decision and remanding the matter to OEA. However, the issue that Judge Macaluso decided differs from the issue brought before this Court. In her Order, Judge Macaluso discussed whether MPD General Order 120.21 could be applied retroactively despite it being enacted after the Petitioner's actions occurred. The question as to which General Order applied to Chief Ramsey at the time he was making his determination does not resolve the issue as to whether MPD General Order 120.21 supercedes 6-B DCMR § 1613.2; consequently, there

has been no final decision concerning this issue, and the law of the case doctrine is inapplicable with respect to this contentious point.

3. Did District of Columbia Municipal Regulation § 1613.2 prohibit Chief Ramsey from increasing Petitioner's penalty?

Petitioner and the FOP argue that Chief Ramsey improperly relied upon MPD General Order 120.21 when he increased the Petitioner's penalty from the proposed penalty of demotion to termination. Petitioner and the FOP contend that, although MPD General Order 120.21 does authorize the Chief of Police to increase a proposed penalty, the District of Columbia Municipal Regulations that were in effect at the time specifically prohibit the decision maker from increasing the penalty, and the regulations supersede the general orders. In addition, Petitioner and the FOP further claim that ALJ Lim did not directly decide this issue. The Court agrees that neither ALJ Lim nor Judge Macaluso specifically addressed whether General Order 120.21 could be applied if it conflicted with a District of Columbia municipal regulation, and this Court will therefore address the issue.

An agency's internal general orders or procedures do not override statutes and regulations. *See District of Columbia v. Henderson,* 710 A.2d 874, 877 (D.C. 1998); *Nunnally v. D.C Metro. Police Dep't*, 80 A.3d 1004, 1012 (D.C. 2013). Courts in this jurisdiction have held that "an MPD General Order essentially served the purpose of an internal operating manual, and does not have the force or effect of a statue or an administrative regulation." *Nunnally*, 80 A.3d at 1012 (internal quotes omitted). In addition, OEA itself recently concluded that an MPD general order that conflicted with a municipal regulation was superceded by that municipal regulation, as "statutes and regulations take precedence over an agency's internal procedures." *In the Matter of: Wilberto Flores v. Metro. Police Dep't*, OEA Matter No. 1601-0131-11, at pp. 6-7 (Mar. 29, 2016).

In this case, there is a conflict between 6-B DCMR § 1613.2, as it was written at the time, and MPD General Order 120.21. Prior to the 2016 revisions to Chapter 16 of the District of Columbia Municipal Regulations, 6-B DCMR § 1613.2 provided:

> The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

47 D.C. Reg. 7094, § 1613.2. In contrast, MPD General Order 120.21 states that, after an appeal is made, the Chief of Police

> may affirm or modify the findings and/or the penalty imposed, remand the case to a previous step in the process, or remand the case for an alternative process, as he/she deems appropriate . . . . [or] [t]he Chief of Police may impose a higher penalty than recommended by the Hearing Tribunal, or the Assistant Chief.

MPD General Order 120.21, Part IV(L)(4)-(5).

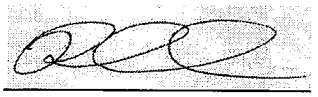
Petitioner and the FOP argue that the OEA did not properly analyze this issue in the IDR, because ALJ Lim did not discuss whether an MPD general order could supersede a District of Columbia municipal regulation. In the IDR, ALJ Lim summarized the issue as whether the new general order could be applied retroactively to the Petitioner's case, and he properly concluded that Judge Macaluso found that it could be. However, ALJ Lim did not address the issue of whether the GO was superceded by the relevant DCMR regulation. The Court finds nothing in the administrative record or the IDR to suggest that the OEA concluded that General Order 120.21 granted Chief Ramsey the authority to act in a way prohibited by the municipal regulations of the District of Columbia. As such, the case must be remanded to OEA in order for OEA to make a determination as to whether MPD General Order 120.21 supersedes applicable version of 6-B DCMR § 1613.2, which can now be found at 47 D.C. Reg. 7094, § 1613.2.

Accordingly, it is this 8th day of June, 2016, hereby

ORDERED that the Petition for Review filed by Petitioner Paula Edmiston is **GRANTED**; it is further

ORDERED that the Initial Decision on Remand of Aministrative Judge Joseph E. Lim is **REVERSED**; and it is further

ORDERED that the case is **REMANDED** for reconsideration, consistent with this opinion, of Petition Paula Edmiston's motion for summary judgment and for further actions as required.



Judge Robert Okun
(Signed in Chambers)

Copies via eService to:

Ted Williams
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Daniel McCartin
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Sheila Barfield
Office of the Employee Appeals

Attachment 18

IN SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PAMELA DISHMAN,	)	
	)	**Civil No. 2015 CA 006355 P(MPA)**
Petitioner,	)	**Calendar 7**
	)	**Judge Jeanette J. Clark**
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC, SCHOOLS *et al.,*	)	**CLOSED CASE**
	)	
	)	
Respondents.	)	

MEMORANDUM AND ORDER GRANTING PETITIONER'S PETITION FOR REVIEW OF AGENCY DECISION AND REVERSING THE DECISION OF THE OFFICE OF EMPLOYEE APPEALS ("OEA")

Before the Court is Petitioner's Petition for Review of Agency Decision ("Petition"), Petitioner's Brief in Support of Petition for Review ("Brief"), Respondent's Brief in Opposition of Petition for Review of Agency Decision ("Opposition"), Petitioner's Reply Brief in Support of Petition for Review ("Reply"), and Petitioner's Praecipe-Notice of Supplemental Authority. Upon a careful review of the Administrative Record and the record herein, the Petition is **GRANTED**. The Court further concludes that OEA's decision is **REVERSED and REMANDED** for the reasons stated below.

I. BACKGROUND

Petitioner worked for the District of Columbia Public Schools ("DCPS") for approximately 23 years, starting on September 30, 1987. R. at 60. On October 22, 2010, Petitioner was notified that "your position at District of Columbia Public Schools (DCPS) is being eliminated as part of a reduction-in-force, effective November 21, 2010." R. at 9. On November 29, 2010, Petitioner filed a Petition for Appeal with OEA

stating, in part, "that the RIF be reversed, and I receive compensation as a Program Manager ET6 as well as receive back pay for previous positions in which I did not receive compensation." R. at 3. According to Petitioner, her position title was "Nonpublic Manager," with DCPS, not "Program Manager." R. at 2. Petitioner argued that the "RIF is procedurally and substantively flawed and it was conducted in a discriminatory and arbitrary manner. In addition, the RIF action was pretextual and was actually a disguise termination to which just cause reviews are requested." R. at 3.

In response, DCPS stated that "[e]mployee was a staff member who performed the function of Program Manager within the Non-Public Unit of the Office of Special Education." R. at 19. Furthermore, DCPS contends that the RIF for the 2010-2011 school year was conducted in accordance with the law and it reduced the Program Managers' position from six to four. R. at 19-20.

By the Administrative Judge's ("AJ") Order dated November 14, 2012, DCPS was ordered, *inter alia*, to provide OEA the following supporting documentation: "3) Employee's last SF-50 . . . and 5) Any relevant personnel records showing that Employee worked in the competitive level form [sic] which she was RIF'd." R. at 41-42. DCPS's December 11, 2012 Brief to Petitioner's OEA Petition attached several documents, including but not limited to, the following: (1) the first "Job Data" form states that the "Position Entry Date: 02/25/2010," "Position Number: 00059070 Manager, Program." R. at 57, Tab 1. What is noteworthy is that, in faint letters, the following words appear on the first "Job Data" form: "Override Position Data." *Id.* The next DCPS "Job Data" form has a data entry date of "02/25/10" and it states that Petitioner was in "Job Code GA0145, COORDINATOR (ET)," "Job Indicator: Primary Job" on that date.

R. at 58. Another "Job Data" form dated December 21, 2010 shows: "Business Title: NON PUBLIC DAY COORDINATOR" for Petitioner. R. at 60. All of these documents post dated the October 21, 2010 notification of the RIF that was sent to Petitioner.

The AJ issued another Order dated December 17, 2012 ordering DCPS to provide: "1) Supporting documentation showing what position she worked in at the time of the instant RIF." R. at 80. DCPS's response to this December 17, 2012 Order could not be located in the record OEA transmitted to this Court. DCPS responded to the AJ's March 11, 2013 Order at R. at 176-184, which included a "Notification of Personnel" Action form indicating Michelle Rhee's resignation effective November 2, 2010.

Next, the AJ issued an Order dated August 30, 2013 requiring DCPS to submit:

> 1. Signed dated CLDF documentation for the instant RIF from the Program Manager competitive level;
> 2. A written statement explaining who conducted the CLDF for the Program Manager competitive level
> 3. An affidavit from the author of the CLDF attesting to the truthfulness and accuracy of the signed and dated documentation;
> 4. An explanation of why the originally submitted documentation does not contain dates or signatures from a HR Representative or the Non-Public Team Director (as substitution for the Principal position); and
> 5. Any additional evidence regarding whether Employee was properly given one round of lateral competition via the instant RIF.

R. at 185-86. This was followed by an Order for Statement of Good Cause because DCPS failed to submit its brief by September 20, 2013. R. at 192. Afterwards, DCPS submitted a Statement of Good Cause and Response to the August 30, 2013 Order. R. at 198-215.[1] The next order issued by the AJ is the Initial Decision dated February 10, 2014. R. at 220-238. The AJ found:

> The competitive level included all staff member [sic] performing the function of Program Manager. DPM §2410 states that each personnel authority shall determine the positions comprising the competitive levels that employees

[1] The last page, R. at 215, is an Affidavit of Joshua Wayne, which has a signature page missing.

> compete for retention. Further, DPM § 2410 states in relevant part that a competitive level shall consist of all positions in the same grade, which are sufficiently alike in qualification requirements, duties, and responsibilities. Agency has submitted personnel documents showing that Employee's position of record was Program Manager. Therefore, I find Employee's arguments that she was terminated as a Non-Public Coordinator, unpersuasive. I find that [sic] Agency fulfilled the requirements of DPM §2410 in establishing the Program Manager competitive level.

R. at 229. Affirming, the AJ, the OEA Board, found, in relevant part, that

> Agency provided personnel documentation that at the time of the RIF action, Employee's position was Program Manager. Moreover, there are affidavits which contend that Employee was a Program Manager and received the lowest ranking of the six Program Managers within her competitive level. Agency submitted the actual CDLFs which show that Employee competed and was ranked against other Program Managers within Non-Public School Unit. Finally, Agency provided the Retention Register which showed Employee with the lowest rank within her competitive level. Therefore, Agency and the AJ did adequately establish that Employee received one round of lateral competition. Thus, the AJ's decision was based on substantial evidence.

R. at 346-47, July 21, 2015, Opinion and Order on Petition for Review. Furthermore, the OEA Board concluded that the "Agency adequately proved that it complied with the statutory and regulatory requirements pertaining to one round of lateral competition and notice. The AJ's decision was based on substantial evidence." R. 347-48.

In summary, Petitioner argues that OEA's decisions were not based on substantial evidence in the record because DCPS failed to submit, in the record, documentation that she was appointed to a Program Manager position. Petitioner correctly points out that the AJ twice ordered DCPS to produce a Form 50 showing Petitioner's appointment to a Program Manager position, but it failed to produce said documentation. Also, Petitioner contends that the AJ and the Board overlooked the lack of documentation that she had been appointed to a Program Manager position.

II. STANDARD OF REVIEW

Pursuant to the Super. Ct. Ag. Rev. R. 1, the Court has jurisdiction to review a final decision of an agency of the District of Columbia. The court cannot "set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Ag. Rev. R. 1(g). "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Reynolds v. Dep't of Emp't Servs.*, 86 A.3d 1157, 1160 (D.C. 2014) (quoting *WMATA v. Dep't of Emp't Servs.*, 926 A.2d 140, 147 (D.C. 2007)). As long as agency decisions are supported by substantial evidence in the record, they must be affirmed "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Consumer Action Network v. Tielman*, 49 A.3d 1208, 1212 (D.C. 2012) (quoting *Ferreira v. Dep't of Emp't Servs.*, 667 A.2d 310, 312 (D.C. 1995)). "'It is not the function of the reviewing court to superimpose its own opinion over the findings of the agency,' but only to determine whether the agency's decision is supported by substantial evidence. *DiVincenzo v. District of Columbia Police & Firefighters Retirement and Relief Bd.*, 620 A.2d 868, 871 (D.C. 1993)." *Davidson v. Office of Emp. Appeals*, 886 A.2d 70, 72 (D.C. 2005).

Furthermore, the reviewing court should make three determinations in its review of an agency's decision under a well-established deferential standard:

> first, whether the agency has made a finding of fact on each material contested issue of fact; second, whether the agency's findings are supported by substantial evidence on the record as a whole; and third, whether that Board's conclusions flow rationally from those findings and comport with the applicable law.

Reynolds v. Dep't of Emp't Servs., 86 A.3d 1157, 1160 (D.C. 2014) (quoting *Miller v.*

Dep't of Emp't Servs., 838 A.2d 326, 327 (D.C. 2003).

Moreover, the Court of Appeals has cautioned that an "agency's interpretation of its own regulations or of the statute which it administers is generally entitled to great deference from this court." *King v. Dep't of Emp't Servs.*, 742 A.2d 460, 466 (D.C. 1999). However, "[w]hen the agency's decision is inconsistent with the applicable statute . . . we owe it far less deference, if indeed we owe it any deference at all." *Id.* (internal quotation marks and citation omitted)." *Poole v. Dep't of Emp't Servs.*, 77 A.3d 460, 465 (D.C. 2013).

Specifically, the Court of Appeals has informed that for OEA decisions

> "our scope of review is 'precisely the same' as in administrative appeals that come to us directly." . . . Our review, moreover, is limited to the administrative record developed by OEA, and we will affirm its decision "so long as [that decision] is supported by substantial evidence in the record and otherwise in accordance with law," including conclusions of law that "follow rationally" from OEA's findings.

Love v. Office of Emp. Appeals, 90 A.3d 412, 420-21 (D.C. 2014) (alteration in original).

III. ANALYSIS

DCPS was required to identify the competitive level for each competitive area involved in the subject RIF. The competitive level identified for Petitioner was a Program Manager. DCPS argues and the AJ and the OEA Board identify Tab 1 of DCPS's Brief dated December 11, 2012 as showing that, at the time of the RIF, Petitioner held the position of Program Manager. However, as the discussion above shows, three Job Data documents in Tab 1 show contradictory identifications of the position that Plaintiff held at the DCPS. Two Job Data documents indicated Petitioner's position was a "Coordinator." Even after, Petitioner was notified of the RIF on October

21, 2010, DCPS failed to produce documentation showing the official position of record for Petitioner.

The Court of Appeals has informed that

> The fact that an employee may have been detailed to a different position at the time of his or her RIF does not change the fact that the establishment of the employee's competitive level is based on the official position description. . . .
>
> An employee's competitive level in a RIF is based on his official position of record. *See Estrin v. Social Security Administration*, 24 M.S.P.R. 303, 305 (1984). When an employee is detailed to or acting in a position, his competitive level is determined by his permanent position, and not the one to which he is detailed or in which he is acting. (citations omitted).

D.C. v. King, 766 A.2d 38, 21-22 (D.C.2001)(affirming the trial court's decision that employee was not RIF'd from his official position of record, but RIF'd from a position to which he was detailed when he was transferred to another office).

Consistent with the Court of Appeals decision, the OEA Board has ruled

> This Office is required to make a determination of an employee's position of record based on an agency's issuance of an official Notification of Personnel Action form. A memorandum to an employee indicating their reassignment of a new position without a corresponding Form 50 is insufficient to support Agency's claim that Employee was officially reassigned to OPIC in this case.

Ross v. Office of Contracting and Procurement, OEA Matter No. 2401-0133-09R11, pp.7 (Apr. 8, 2013). In *Ross*, the OEA concluded that the

> Agency did not properly reassign Employee to a new position prior to the RIF, thus Employee was RIF'd from a position that she did not officially occupy. Agency's March 18, 2008 memorandum should have corresponded with an official personnel action form initiated by the Human Resources department. Accordingly, I find that Agency failed to provide Employee within one round of lateral competition under § 1-624.08.

Id. at 8.

Likewise here, there is no evidence in the record that a Form 50 exists which shows Petitioner was assigned to a Program Manager position, and her RIF notification

did not correspond to any official personnel action form initiated by the Human Resources department. Therefore, DCPS failed to provide Petitioner with one round of lateral competition pursuant to D.C. Code § 1-624.08.

IV. CONCLUSION

OEA's decision was not supported by substantial evidence in the record and is contrary to law. Therefore, the Petition is granted, and OEA's decision is reversed.

WHEREFORE, it is this 26th day of August 2016, hereby,

ORDERED, that the Petition is **GRANTED;**

FURTHER ORDERED, that OEA's July 27, 20015 Opinion and Order on Petition for Review is **REVERSED AND VACATED AND THE CASE IS REMANDED TO OEA for proceedings consistent with this Oder**; and it is

FURTHER ORDERED, that the 2015 CA 006355 P(MPA) is **CLOSED and DISMISSED**; and it is

FURTHER ORDERED, that the Status Hearing scheduled for September 16, 2016 is **VACATED**.

SO ORDERED.

Jeanette J. Clark

Judge Jeanette J. Clark
D. C. Superior Court

Copies e-served, e-filed and docketed on this 26th day of August 2016:

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Attachment 19

District of Columbia
Court of Appeals

No. 15-CV-997

FLORENTINO RODRIGUEZ,
Appellant,

CAP-241-14

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,
Appellee,

and

DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN RESOURCES,
Intervenor.

On Appeal from the Superior Court of the District of Columbia
Civil Division

BEFORE: GLICKMAN and THOMPSON, *Associate Judges*; and FERREN, *Senior Judge*.

JUDGMENT

This case was submitted to the court on the transcript of record and the briefs filed, and without presentation of oral argument. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the decision of the Superior Court is reversed; the decision of the Office of Employee Appeals ("OEA") is vacated; and the matter is remanded for further proceedings not inconsistent with this opinion.

For the Court:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Dated: August 25, 2016.

Opinion by Associate Judge Phyllis D. Thompson.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-CV-997

FLORENTINO RODRIGUEZ, APPELLANT,

v.

DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS, APPELLEE,

and

DISTRICT OF COLUMBIA DEPARTMENT OF
HUMAN RESOURCES, INTERVENOR.

Appeal from the Superior Court
of the District of Columbia
(CAP-241-14)

(Submitted March 15, 2016 Decided August 25, 2016)

John F. Pressley, Jr., was on the brief for appellant.

Lasheka Brown Bassey filed a statement in lieu of brief on behalf of appellee.

Karl A. Racine, Attorney General for the District of Columbia, *Todd S. Kim*, Solicitor General, and *Loren L. AliKhan*, Deputy Solicitor General, were on the brief for intervenor.

Before GLICKMAN and THOMPSON, *Associate Judges*, and FERREN, *Senior Judge*.

THOMPSON, *Associate Judge*: Florentino Rodriguez ("appellant" or the "Employee") challenges a decision of the District of Columbia Office of Employee Appeals ("OEA") that upheld his termination from his position as an Urban Park Ranger with the District of Columbia ("District") Department of Parks and Recreation after he failed a random drug test. He contends, *inter alia*, that his termination was improper because, in violation of the applicable collective bargaining agreement (the "CBA"), the District's personnel agency, the District of Columbia Department of Human Resources ("DHR" or the "Agency"), failed to provide notice to Local 2741 of the American Federation of Government Employees ("Union") (the union for appellant's bargaining unit) within forty-five business days of the date when the Agency knew or should have known of the act or occurrence that triggered the termination. We need not reach appellant's other arguments because we agree with him that Article 24, Section 2.2 of the CBA precluded his termination in light of the Agency's failure to give timely notice to the Union. Accordingly, we reverse the decision of the Superior Court, vacate the OEA decision, and remand for further proceedings not inconsistent with this opinion.

I.

On April 20, 2010, appellant submitted to a random drug test that the Agency conducted pursuant to the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA").[1] On or about May 25, 2010, the Agency received the final test results: appellant's urine tested positive for marijuana. On June 30, 2010, the Agency served appellant with a notice of proposed adverse action, announcing that it planned to terminate his employment because the drug test revealed marijuana in his system. The notice informed appellant that he had a right to respond to the notice, to provide statements or documents in support of his response, and to be represented. Appellant obtained legal representation and filed a written response to the notice, asserting that (1) he had not smoked marijuana but had inhaled second-hand marijuana smoke, which he asserted caused the positive drug test results, (2) the results of the drug tests were reported incorrectly, and (3) his use of legal prescriptions and over-the-counter drugs led to a "false positive."

On July 21, 2010, a DHR Hearing Officer issued his report and recommendation. He determined that appellant's argument and supporting documents failed to "outweigh[] or call[] into question the recent drug test results[,]" which "accurately reflect[ed] the presence of marijuana in Employee's

[1] *See* D.C. Code § 1-620.32.

urine[,]" and that the preponderance of evidence "support[ed] the existence of the cause for Employee's termination." The Hearing Officer concluded nevertheless that the proposed adverse action was precluded. He noted that under Article 24, Section 2.2 of the CBA, both the employee and the Union must be given notice of potential adverse actions, and that "[a]lthough the employee received the [n]otice, it does not appear that notice was provided to Employee's union." The Hearing Officer further noted that the CBA provides that "[t]he failure of Employer to issue such notice shall preclude the discipline pursuant to law."

On August 9, 2010, Karla Kirby, the DHR Deciding Official, issued her notice of final decision to remove appellant from his position. Deciding Official Kirby rejected the Hearing Officer's recommendation that adverse action was precluded. She reasoned that termination was permissible because appellant did not raise in his response the issue of a violation of the CBA for failure to notify the Union, and because "[t]here is no evidence in the record which indicates that there was a violation of the CBA with respect to notification to the union." Kirby characterized the Hearing Officer's finding that the CBA was violated as "conclusory and not supported by any facts or evidence in the record." She further reasoned that, even assuming that no separate notification was given to the Union, service of notice to appellant, a member of the Union, constituted sufficient notice

to the Union, and also that there was "no evidence that the employee suffered any diminution of his rights in this case[,]" as he was "ably represented in this matter by his attorney[.]" In addition, Deciding Official Kirby agreed with the Hearing Officer's assessment that there was "no justification for the presence of [m]arijuana in the employee's system." She determined that appellant should be removed from his position effective August 28, 2010.

On September 24, 2010, appellant filed a Petition for Appeal with the OEA, challenging DHR's decision to terminate his employment. Senior Administrative Judge Joseph E. Lim (the "ALJ") issued his decision on December 19, 2013. The ALJ found that appellant tested positive for marijuana use; that appellant's challenge to the drug test results was without merit; that there was "no evidence that the Agency gave notice of its proposed adverse action to [the] Union"; and, more definitively, that the Agency "did not provide [the] Union a notice of the proposed action." He also concluded that it "appear[ed] that [the] Agency violated Article [24, Section 2.2] of the CBA." The ALJ then considered whether the Agency's failure to give the required prior written notice to the Union precluded appellant's termination. The ALJ noted that appellant did not make any arguments about a CBA violation in response to the notice he received even though he had received an extension of time to respond and thereafter responded through an

attorney. "Therefore," the ALJ concluded, "although [the] Agency violated the CBA, it does not appear that it harmed Employee." Applying "the OEA's [r]ule for harmless error,"[2] the ALJ determined that the violation was harmless because "it did not affect Employee's substantial rights, did not affect [the] Agency's decision, and did not affect Employee's presentation of his defense so that a different decision could have been reached."[3] Having determined that the penalty

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[2] The OEA harmless error rule was set out in 6 DCMR § B631.3 (2013), which provides:

> Notwithstanding any other provision of these rules, [OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

See also Harding v. District of Columbia Office of Emp. Appeals, 887 A.2d 33, 34 (D.C. 2005) (citing the regulation as then codified in 6 DCMR § 632.4 (1999)).

[3] In support of his decision, the ALJ cited *Cornelius v. Nutt*, 472 U.S. 648, 659 (1985) (explaining that "in an appeal of an agency disciplinary decision to the [Merit Systems Protection] Board, the agency's failure to follow bargained-for procedures may result in its action's [sic] being overturned, but only if the failure might have affected the result of the agency's decision to take the disciplinary action against the individual employee"); *Aleck v. United States Postal Serv.*, 192 F. App'x 957, 959 (Fed. Cir. 2006) (rejecting the claim that agency committed harmful procedural error when, during its initial investigation of a vehicle incident, it denied the employee union representation, reasoning that the employee "failed to establish the likelihood that, had he received union representation . . . , the agency might have reached a different conclusion in the matter"); *Handy v. United States*

(continued...)

of removal was within the range allowed by law and regulations, the ALJ upheld the Agency's action.

On January 14, 2014, appellant filed in the Superior Court a petition for review of the OEA decision. On July 29, 2015, the Honorable Robert Okun issued an order denying Rodriguez's petition. Citing the OEA's harmless error regulation as well as *Harding* and *Cornelius*, Judge Okun agreed with the OEA that the Agency was "not precluded from terminating [appellant's] employment because the failure to provide notice to [the] Union was harmless error[.]" Judge Okun "accord[ed] great weight" to the OEA decision and noted that appellant had not "shown that he would have received different discipline had the Union been

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(...continued)
Postal Serv., 754 F.2d 335, 337 (Fed. Cir. 1985) (affirming the decision removing the employee and treating as harmless error the Postal Service's denial of his statutory procedural right to make an oral reply to the charges that were the basis for his termination); and *Harding*, 887 A.2d at 34 (affirming OEA decision that upheld agency's decision to abolish employee's position even though the employee received only twenty-two days' notice, instead of the required thirty days' notice, of a reduction in force, because the employee did "not contend, nor can he, that he would not have been separated from the [agency] if he had received the full thirty-day notice required by statute[,]" and thus the failure to give timely notice was harmless error).

notified pursuant to the CBA." Judge Okun therefore affirmed the OEA's ruling upholding appellant's termination.[4] This appeal followed.

II.

Although the appeal comes to us from the Superior Court, we review the administrative decision "as if the appeal had been taken directly to this court." *Hutchinson v. District of Columbia Office of Emp. Appeals*, 710 A.2d 227, 230 (D.C. 1998). The OEA decision "must state findings of fact on each material contested factual issue; those findings must be supported by substantial evidence in the agency record; and the . . . conclusions of law must follow rationally from its findings." *District of Columbia Fire & Med. Servs. Dept. v. District of Columbia*

[4] Judge Okun rejected, however, OEA's determination that appellant was required to file a grievance (rather than use the statutory appeal procedure established by the Comprehensive Merit Personnel Act, which provides for appeals to the OEA) to complain of DHR's failure to comply with the CBA.

Judge Okun also rejected as "meritless" appellant's argument that, pursuant to 6B DCMR 1601.2 (2009) ("Any procedural system for the review of adverse action negotiated between the District of Columbia and a labor organization shall take precedence over the provisions of this chapter for employees in a bargaining unit represented by a labor organization, to the extent that there is a difference."), the CBA took "precedence over provisions relating to government employee disciplinary procedures[,]" in particular the OEA's harmless error regulation. Judge Okun reasoned that appellant was "not challenging the appeals procedure utilized in his case," but instead was challenging "the substantive decisions made throughout the appeals process."

Office of Emp. Appeals, 986 A.2d 419, 424 (D.C. 2010) (internal quotation marks omitted). We "must affirm the OEA's decision so long as it is supported by substantial evidence in the record and otherwise in accordance with the law." *Dupree v. District of Columbia Office of Emp. Appeals*, 36 A.3d 826, 830 (D.C. 2011) (internal quotation marks omitted). We are not, however, required to "stand aside and affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law." *Teamsters Local Union 1714 v. Public Emp. Relations Bd.*, 579 A.2d 706, 709 (D.C. 1990) (internal quotation marks omitted).

III.

Appellant raises a number of arguments about why the OEA decision was erroneous, but we focus on the following contention, with which we agree and which we conclude is dispositive: that, even if the OEA harmless error review rule is applicable, DHR's decision to terminate appellant's employment, despite the Agency's failure to give the Union the notice required under Article 24, Section 2.2 of the CBA, fails harmless error review.

As a preliminary matter, we note that the CBA, a copy of which is included in the OEA record, provides by its terms that it "shall remain in full force and effect until September 30, 1995[,]" and, that absent objection, it "shall automatically be renewed for a one (1) year period thereafter[.]" Nothing in the record establishes that this duration was formally extended to make the CBA applicable to the time period at issue here. However, our case law establishes that "an expired collective bargaining agreement may continue in effect if the parties continue to act as if they are performing under it." *Pitt v. District of Columbia Dep't of Corr.*, 954 A.2d 978, 983 (D.C. 2008) (brackets omitted); *see also Hahn v. University of the District of Columbia*, 789 A.2d 1252, 1258-59 (D.C. 2002) ("Both the University and the Union appear to be abiding by the terms of the CBA even though it expired more than eight years ago. . . . In these circumstances, we hold that the provisions of the CBA are still in effect[.]"). Since neither the parties nor the intervenor has questioned the applicability of Article 24, Section 2.2 of the CBA, we assume for purposes of our analysis that it is applicable.

We also note preliminarily that no one has asked us to overturn the OEA determination that DHR "violated the CBA[.]" The DHR Deciding Official had espoused the view that notice to appellant sufficed as notice to the Union and also suggested that appellant had failed to prove that the Union did not receive a

separate notice (leading the Deciding Official to assert that the Hearing Officer's finding about a violation of the CBA was "not supported by any facts or evidence in the record"). Further, before the OEA, DHR argued that the CBA provision on which appellant relies is "invalid."[5] However, although DHR refers repeatedly in its brief to an "alleged" violation of the CBA, it has not pressed those arguments in this court.[6] Accordingly, our analysis proceeds on the assumption that Article 24,

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[5] Highlighting the "pursuant to the law" language of Article 24, Section 2.2, DHR asserted that the relevant CBA provision was negotiated when D.C. Code §1-617.1 (b-1) (1995) provided generally that "no corrective or adverse action shall be commenced . . . more than 45 days . . . after the date . . . of the act or occurrence allegedly constituting cause." DHR argued that § 1-617.1 (b-1) — and therefore Article 24, Section 2.2 — was superseded by the CYSHA, which "was enacted to protect the children and youth of the District" from drug use and its effects. The OEA did not specifically address these arguments.

[6] DHR does fault appellant for not having preserved the issue of whether notice was given to the Union, given that he did not argue the point in his submission to the Hearing Officer. We note, however, that the record does not indicate the date of appellant's response to the notice of proposed adverse action, and thus does not make clear whether the forty-five-business-days deadline for notifying the Union had passed by the time appellant made his submission. Also, the record does not indicate whether appellant or his lawyer had a copy of the CBA (and we note that, as late as April 2013, his lawyer told the OEA that the parties had "never conducted full discovery" in the case) and thus (as would likely have *not* been the case with a Union representative) they may have been unaware of the failure-of-notice-shall-preclude-discipline provision. In any event, the short answer to DHR's preservation point is that the Hearing Officer "flagged the [notice-to-the-Union] issue *sua sponte*" and the Deciding Official and the OEA addressed it. The following rule therefore applies: "[E]ven if a claim was not pressed below, it properly may be addressed on appeal so long as it was passed upon." *Littlejohn v. United States*, 73 A.3d 1034, 1038 n.3 (D.C. 2013).

Section 2.2 of the CBA was valid at all times relevant to this appeal and that DHR violated its terms, as the OEA found.

Article 24, Section 2.2 of the CBA provides in relevant part that:

> An employee and the Union shall be notified in writing of any proposed disciplinary or adverse action within forty-five (45) days, no[t] including Saturdays, Sundays, or legal holidays, after the date that the Employer knew or should have known of the act or occurrence.
>
> In the event that the act or occurrence allegedly constituting cause for discipline is the subject on an ongoing criminal investigation, the 45-day limit imposed by the previous paragraph of this section shall be tolled until the conclusion of the criminal investigation.
>
> The failure of the Employer to issue such notice shall preclude the discipline pursuant to the law.

The CBA also memorializes the "underst[anding]" between DHR and the Union "that the employees in the bargaining unit shall have full protection of all Articles in this Agreement as long as they remain in the bargaining unit."

As recounted above, the OEA ALJ found that DHR failed to provide the notice to the Union required by Article 24, Section 2.2 of the CBA, but went on to apply harmless error review and found that the CBA violation did not prejudice appellant. We take no issue with OEA's invocation of its harmless error

regulation.[7] We also can agree that application of harmless error review might warrant a ruling in favor of the Agency if Article 24, Section 2.2 of the CBA provided only that the Union was to be notified in writing within forty-five days "after the date that the Employer knew or should have known of the act or occurrence[,]" without specifying any consequence of the failure to give the requisite notice.[8] As the OEA ALJ found, appellant had legal representation and, despite the absence of Union representation, was able to raise a number of non-frivolous arguments in an attempt to avoid termination based on his drug test results.

However, Article 24, Section 2.2 of the CBA goes further than merely establishing a notice-to-the-Union requirement: it provides that "[t]he failure of

[7] Again, the regulation, 6 DCMR § B631.3, provides that "[OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless." Per *Cornelius*, the term "agency's 'procedures'" includes "not only procedures required by statute, rule, or regulation, but also procedures required by a collective-bargaining agreement between the agency and a union." 472 U.S. at 659 (footnote omitted). Similarly, we conclude, the term "policies" in 6 DCMR § B631.3 includes Article 24, Section 2.2 of the CBA — meaning that the OEA properly applied harmless error review.

[8] *Cf. In re Morrell*, 684 A.2d 361, 370 (D.C. 1996) (attorney discipline case reasoning that because "[n]othing in the text of the [disciplinary] rules . . . specifies the result of a Hearing Committee's failure to adhere to the [sixty-day] time limit [for issuing its decision], . . . we presume that the rule is directory, rather than mandatory[,]" and attorney could show no prejudice from the delay).

the Employer to issue such notice shall preclude the discipline[.]" Contrary to the OEA's reasoning, failure of the Agency to adhere to that provision cannot be said to amount to harmless error, because if the Agency had complied with the provision, appellant's employment would not have been terminated. It is useful to compare this case to *Sutton v. United States*, No. 14-CO-0955, 2016 D.C. App. LEXIS 204 (D.C. June 23, 2016). In *Sutton*, a panel of this court reasoned that where the trial court permitted the government to amend the criminal information on the day of trial to add a new charge in violation of Super. Ct. Crim. R. 7 (e), the violation did not affect the defendant's substantial rights and was harmless error. *Id.* at *7-8, 14-16. Notably, it was not sufficient for purposes of our analysis that the amendment had no effect on the defense strategy; necessary to the conclusion that the defendant was not prejudiced by the court's failure to adhere to Rule 7 (e) was the additional fact that jeopardy had not attached at the time of the amendment, meaning that if the trial court had denied the motion to amend the information, "the government could still have voluntarily dismissed the charges and filed a new information[,]" leaving the defendant in exactly the same position he was in as a result of the erroneously permitted amendment. *Id.* at *14.

Here, by contrast, with the Agency having failed to give the Union timely notice, the CBA required a "permanent retraction" (to use the Hearing Officer's

words) of any discipline based on the results of the April 20, 2010, drug test. The parties do not specifically identify the date on which the forty-five business days began to run or the precise date by which DHR was required to give notice to the Union, but we presume that the forty-five-business-days period began on or about May 25, 2010, the date of the medical review officer's report conveying the drug test results to DHR. Thus, by the date when Deciding Official Kirby announced appellant's termination (August 9, 2010), it was impossible for the Agency to give notice to the Union within forty-five business days of the date when it "knew or should have known of the act or occurrence" that triggered the potential discipline; i.e., the forty-five-day deadline had irrevocably passed.[9]

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[9] As a practical matter, the Employer's failure to give notice to the Union within 45 days of the date of the occurrence triggering adverse action may not be truly irrevocable in cases where the occurrence leads to an additional occurrence (e.g., an arrest or conviction, workplace hostility attributable to the initial occurrence, etc.) that could constitute an independent ground for adverse action, and that would trigger a new 45-day notice period. Thus, the Employer's negligent failure to satisfy the 45-day notice-to-the-Union requirement would not necessarily prohibit the Employer from terminating the employment of a worker who commits a criminal or other heinous act in the workplace. In any event, it seems clear from the second quoted paragraph of Article 24, Section 2.2 that the parties intended for the 45-day notice requirement to be given effect even where the occurrence triggering discipline involves conduct so serious as to be criminal. The only exception to the notice requirement that is specified in Article 24, Section 2.2 is tolling of the 45-day notice period where the occurrence triggering the proposed discipline is the subject of "an ongoing criminal investigation." Under the *expressio unius* maxim (when express mention is made of one thing, the exclusion of others is implied), that express exception "reasonably . . . impl[ies] the (continued...)

Unlike *Harding*, this is not a case where appellant cannot "contend . . . that he would not have been separated[,]" 887 A.2d at 34, if the agency had complied with the applicable provisions regarding notice. Rather, "failure to follow bargained-for procedures . . . affected the result of the agency's decision to take the disciplinary action against the individual employee." *Cornelius*, 472 U.S. at 659. DHR argues that we owe deference to OEA's contrary "construction of its harmless-error rule," but we need not defer where OEA failed to appreciate the mandatory nature[10] of the CBA provision that states that "[t]he failure of the Employer to issue such notice [to the union] shall preclude the discipline[.]" As appellant points out, the CBA "did not simply require that the union be notified, it spelled out specific consequences if the union was not notified" within forty-five days of "the date that the Employer knew or should have known of the act or occurrence": "the adverse action could not be taken."

(...continued)
preclusion" of other exceptions to the 45-day notice requirement. *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 427 (D.C. 2009).

[10] "The general rule is that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." *Teamsters Local Union 1714*, 579 A.2d at 710 (quoting *Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (internal quotation marks and alteration omitted)).

We reject OEA's view that the violation of this mandatory provision of the CBA was a mere "technical procedural error." In *Logan v. United States*, 591 A.2d 850, 853 (D.C. 1991), this court concluded that there was a "harmless technical" violation of the statute requiring the government to give a criminal defendant written, pre-trial notice of previous convictions on which the government intends to rely in seeking a sentence enhancement. *Id.* We reasoned that where the defendant "receive[d] clear notice of a previous conviction, a misstatement as to a single piece of information, such as the date of a conviction or the county in which a conviction was imposed, [must be] deemed harmless" because "the purposes of the statute were fulfilled." Here, whatever the Union's reason for bargaining for the failure-of-notice-shall-preclude-discipline provision, we cannot conclude that "the purposes of the [provision] were fulfilled" notwithstanding the failure to give timely notice to the Union.[11]

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[11] The Deciding Official and the OEA ALJ seemed to assume that the sole purpose of notice to the Union was to give the employee a chance to arrange representation, concluding that appellant "suffered [no] diminution of his rights" because he was "ably represented in this matter by his attorney[.]" The fact that Article 24, Section 2.2 does not require that the Union and the employee receive simultaneous notice weighs somewhat against that assumption. Further, another provision of the CBA causes us to question that assumption. Article 6, Section 8 of the CBA provides that "if disciplinary action could result" from an "examination of an employee by a Management official in connection with an investigation," if "the employee requests representation," and "[i]f a Union representative is not available, the employee will be given a reasonable amount of time to obtain [other] representation." That provision implies, on the one hand, a

(continued...)

We note that the CBA provision that "failure of the Employer to issue such notice shall preclude the discipline" is quite unlike other CBA provisions that establish notice-to-the-Union requirements but do not say what consequences

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(...continued)
recognition that legal representation can sometimes be an adequate substitute for Union representation. But it suggests on the other hand that when the Union wanted to allow other "representation" to substitute for involvement of the Union in contexts where disciplinary action against an employee may result, it knew how to have the CBA say so. That the CBA does *not* say so in Article 24, Section 2.2 is therefore telling; i.e., the omission suggests that in the circumstance addressed in Article 24, Section 2 (the circumstance of "disciplinary or adverse action" against an employee actually being proposed), an employee's success in obtaining legal representation is not a substitute for the required notice to the Union.

In any event, it would be short-sighted to assume that the Union had a single, narrow objective in bargaining for the failure-of-notice-shall-preclude-discipline provision. We cannot discount the possibility that the Union bargained for notice of potential adverse actions pursuant to an objective of "safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-61 (1975); *cf.* Theodore C. Hirt, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 342-43 (1974) ("Steward presence at [a] disciplinary meeting gives the union information that enables it to detect trouble spots to be treated in future contract negotiations. The union also gains detailed knowledge of a potential grievance and is therefore better able to identify and prosecute substantial grievance claims. . . . [T]he steward ensures . . . that the result will be a proper precedent for future employer decisions on discipline."). The Union possibly had some other objective that we do not (and need not) understand and will not attempt to second-guess. It is enough to recognize that the Union bargained for a specific prohibition: that failure to give timely notice to the Union precludes discipline.

follow from failure to adhere to them.[12] Those other provisions — but not Article 24, Section 2.2 — are the types of collective bargaining provisions that the Supreme Court discussed in *Cornelius*, violations of which may be found harmless.

IV.

The preclusion of discipline that Article 24, Section 2.2 mandates is a bargained-for provision that DHR could have declined to accept at the time the CBA was negotiated, but that the Agency instead accepted pursuant to what the CBA describes as "negotiations during which both parties had unlimited right and opportunity to make demands and proposals with respect to any mandatory negotiable subject matter." Article 34, Section 3. We agree with the Hearing Officer's conclusion that "the failure to provide the required notice [to the Union] pursuant to the CBA preclude[d] the adverse action." Accordingly, we reverse the

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[12] *See, e.g.*, Article 13, Section 3 (providing that "[i]f a reassignment or relocation of a Union representative is planned, the Union President will be given a ten (10) day advance written notice[,]" but not specifying any consequence for non-compliance); Article 16, Section 3 (stating that "[t]he Employer agrees to give the Union at least thirty days advance notice . . . of the intent to contract out work which has not previously been contracted out[,]" but not specifying any consequence for non-compliance); Article 17, Section 3 (stating that "[a]t least thirty (30) days prior to the Department's effecting a reorganization, the Department shall notify the Union in writing and shall provide [specified] information[,]" but not specifying any consequence for non-compliance).

decision of the Superior Court, vacate the decision of the OEA, and remand for "further proceedings not inconsistent with this opinion."[13]

So ordered.

[13] *Mitchell v. District of Columbia*, 736 A.2d 228, 232 (D.C. 1999).

Attachment 20

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

METROPOLITAN POLICE DEPARTMENT	:	Case Number: 2016 CA 5655 P(MPA)
v.	:	Judge: Florence Y. Pan
THE DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS	:	

ORDER

This matter comes before the Court upon consideration of the Metropolitan Police Department's ("MPD") Petition for Review, filed on August 1, 2016. MPD requests review of an Initial Decision on Remand issued by the Administrative Law Judge ("ALJ") in the District of Columbia Office of Employee Appeals ("OEA"), on June 27, 2016. MPD submitted a brief in support of its petition. In lieu of a brief, OEA submitted the ALJ's Initial Decision on Remand. The Court has considered the pleading filed by MPD, OEA's pleading relying on the ALJ's Initial Decision on Remand, the decisions issued by the ALJ and the OEA Board, oral argument heard by the Court on August 18, 2017,[1] and the entire administrative record. For the following reasons, the Court grants the Petition, and reverses and vacates the ALJ's Initial Decision on Remand.

PROCEDURAL HISTORY

The instant petition for review arose out of MPD's termination of Heather Straker. *See generally* Petition for Review ("Pet."). Ms. Straker was a police officer with the MPD for seven and a half years. *See* A.R. at 2. On February 21, 2012, Ms. Straker was indicted by a D.C. Superior Court grand jury on charges of first-degree fraud and second-degree theft. *See* Administrative Record ("A.R.") at 63-64. On April 19, 2012, based on this indictment, MPD

[1] Although MPD, OEA, and Ms. Straker had notice of the motion hearing, only MPD appeared and presented oral argument. No representative appeared on behalf of OEA or Ms. Straker.

issued a Proposed Notice of Indefinite Suspension Without Pay pending resolution of the charges against Ms. Straker. *See* A.R. at 19-20.

On May 14, 2012, Ms. Straker filed a response to the Proposed Notice of Indefinite Suspension Without Pay that challenged MPD's proposed action. *See* A.R. at 21-28. In pertinent part, Ms. Straker asserted that it was unlawful for MPD to suspend her without pay. *See* A.R. at 21. Ms. Straker argued that an employee indicted for a crime must be put on enforced leave pursuant to D.C. Code § 1-616.54 rather than indefinite suspension without pay. *See* A.R. at 24-25.

On May 18, 2014, MPD rejected Ms. Straker's arguments and issued a Final Notice of Indefinite Suspension Without Pay. *See* A.R. at 30-32.

On June 20, 2012, Ms. Straker resolved the pending criminal matter by entering into a community service deferred prosecution agreement with the United States Attorney's Office ("USAO"), which stipulated to a dismissal of the charges if she completed community service and resigned from her position with MPD. *See* A.R. at 65-66.

On June 29, 2012, Ms. Straker filed an appeal of her suspension to an ALJ in the OEA. *See* A.R. at 1-36. In relevant part, Ms. Straker contended that MPD had committed harmful error and violated her due process rights when it put her on indefinite suspension without pay, as opposed to enforced leave, under D.C. Code § 1-616.54. *See id.* She further argued that MPD failed to carry out the requirements of the enforced-leave provision. *See id.* On August 3, 2012, MPD filed its response opposing Ms. Straker's appeal. *See* A.R. at 41-43.

On September 27, 2012, MPD issued a Notice of Proposed Adverse Action proposing termination of Ms. Straker; and on the same day, Ms. Straker resigned. *See* Petitioner's Brief ("Pet. Br.") at 5.[2]

At a status hearing before the ALJ on March 11, 2014, the ALJ ordered the parties to submit briefs on two issues: (1) whether MPD followed D.C. law and applicable regulations when it placed Ms. Straker on indefinite suspension without pay; and (2) whether the penalty of indefinite suspension without pay was lawfully imposed. *See* A.R. at 91.

On April 8, 2014, MPD submitted its brief contending that it had cause to place Ms. Straker on indefinite suspension without pay under MPD General Order 120.21 and asserting that indefinite suspension without pay was an appropriate penalty under the Collective Bargaining Agreement ("CBA"). *See* A.R. at 98-151. Ms. Straker filed her brief on May 27, 2014, again claiming that MPD unlawfully suspended her without pay. *See* A.R. at 180-207.

On July 2, 2014, the ALJ issued her Initial Decision reversing the suspension without pay, and finding that MPD committed harmful error when it used the wrong provision to put Ms. Straker on indefinite leave. *See* A.R. 208-216. The ALJ determined that MPD should have used the enforced-leave provision under D.C. Code § 1-616.54, placing her on administrative leave for five work days, and then allowing her to be on enforced annual leave, or if no leave was available, leave without pay. *See* A.R. at 213. Additionally, the ALJ found that MPD should have informed Ms. Straker of her right to a written opinion within five days. *See id.*

On August 1, 2014, MPD submitted a petition for review of the ALJ's decision to the OEA Board (hereinafter "the Board"), reiterating its arguments and contending that, even though MPD used suspension instead of enforced leave under D.C. Code § 1-616.54, Ms. Straker was

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[2] Despite both parties alluding to a Notice of Proposed Action, no copy of the action is included in the administrative record.

afforded due process and that any error was procedural and not harmful. *See* A.R. at 221-22. Ms. Straker responded to MPD's petition on September 30, 2014, asserting that MPD's failure to follow D.C. Code § 1-616.54 was harmful error, resulting in loss of pay from her inability to use her accrued annual leave. *See* A.R. at 276-301.

The OEA Board Decision

On March 29, 2016, the Board issued its decision affirming the ALJ's determination that MPD had violated the requirements of D.C. Code § 1-616.54. *See* A.R. at 302-10. The Board held, however, that despite MPD's violation of the statute, MPD offered Ms. Straker the equivalent of administrative leave "in practice." *See* A.R. at 301. MPD issued its Proposed Notice of Indefinite Suspension Without Pay on April 19, 2012, but did not suspend Ms. Straker until June 2, 2012. *See* A.R. at 307. Had MPD acted under D.C. Code § 1-616.54, Ms. Straker would have been on administrative leave until April 24, 2012. *See id.* Thus, she was effectively on administrative leave for thirty-nine days rather than the requisite five days.[3] *See id.*

Further, the Board found that MPD violated the applicable statute when it failed to issue Ms. Straker a timely notice of its final decision. *See* A.R. at 307-08. D.C. Code § 1-616.54 requires MPD to issue final, written notice of its decision during the five days of administrative leave. *See* A.R. at 308. In Ms. Straker's case, MPD should have issued the written notice by April 24, 2012. *See id.* Instead, MPD did not issue its Final Notice of Indefinite Suspension Without Pay until May 18, 2012. *See id.* The Board, however, determined that MPD's violation of this requirement did not harm Ms. Straker because she was paid until June 2, 2017. *See id.* Additionally, the Board determined that MPD continued to violate the statute (which would have

[3] The Board used the date of MPD's Proposed Notice of Indefinite Suspension Without Pay to calculate when Ms. Straker should have been put on administrative leave. *See* A.R. at 307.

allowed Ms. Straker to be on enforced-leave status) from June 2, 2012, until Ms. Straker's indictment was resolved on June 20, 2012. *See* A.R. at 308.

Ultimately, the Board held that Ms. Straker was entitled to be placed on enforced-leave status during the period between June 2, 2012, and June 20, 2012, and might be entitled to "back pay" during that period. *See* A.R. at 308.[4] The Board remanded to the ALJ for "additional determinations . . . regarding [Ms. Straker's] annual leave status" and to "determine if [Ms. Straker] had leave which could have extended her paid leave beyond June 2, 2012." *See id.*

Decision on Remand

On June 27, 2016, the ALJ issued her Initial Decision on Remand upholding her prior reversal of MPD's action. *See* A.R. at 322-327. In compliance with the Board's remand order, the ALJ found that Ms. Straker had accrued 77 hours of annual leave by June 20, 2012, and 83 hours of annual leave by June 30, 2012. *See* A.R. at 325.

Additionally, the ALJ determined that MPD had: (1) committed harmful error when it used the wrong provision of law in placing Ms. Straker on suspension instead of enforced leave, and failed to comply with the process and notice requirements of D.C. Code § 1-616.54; (2) violated Ms. Straker's due process rights; and (3) violated the Article 12, Section 10 of the CBA. *See id.*

In relevant part, Article 12, Section 10, of the CBA provides:

> If the Employer suspends an officer without pay during the resolution of a criminal indictment and the criminal indictment is dropped or in any way resolved, then the Employer agrees to return the officer to a pay status or issue notification of the charges and proposed action within thirty (30) business days of the date the indictment was either dropped or resolved.

[4] Although the Board opinion uses the term "backpay," it appears in context to be referring to any accrued annual leave that Ms. Straker could have used during the period of June 2, 2012, to June 20, 2012.

See id. The ALJ determined that MPD violated this provision because the indictment was resolved on June 20, 2012, when Ms. Straker entered into the deferred prosecution agreement with the USAO, but MPD did not issue a Notice of Proposed Adverse Action until September 27, 2012 – more than thirty days after the resolution of the indictment. *See id.*

Based on supplemental briefings filed by the parties on remand, the ALJ found that Ms. Straker was actually paid between June 2, 2012, and June 20, 2012, and therefore was not entitled to further compensation for that period. *See id.* The ALJ also concluded, however, that Ms. Straker was entitled to use her annual leave following the resolution of the criminal matter to extend her pay beyond June 21, 2012. *See id.* The ALJ awarded Ms. Straker full backpay between June 21, 2012, and September 27, 2012, apparently to remedy MPD's violations of D.C. Code § 1-616.54, Ms. Straker's due process rights, and the CBA. *See id.*[5]

The Petition for Review

Following the issuance of the ALJ's decision, MPD filed the instant petition with this Court. *See generally* Pet.; *see also* Pet. Br. In its brief, MPD contends that the ALJ's Initial Decision on Remand should be reversed and vacated because the ALJ exceeded the scope of the Board's remand instructions when she addressed MPD's alleged violation of the CBA. *See* Pet. Br. at 10-12. Additionally, MPD argues that, even if such a violation occurred, the violation was harmless because Ms. Straker had already resigned from the MPD and was paid out her leave balances upon her resignation. *See id.* Moreover, MPD asserts that Article 12, Section 10, of the CBA would only have entitled Ms. Straker to reimbursement after August 3, 2012 – thirty days after the resolution of her indictment. *See* Pet. Br. at 2.

[5] Full backpay during this period of approximately three months exceeded Ms. Straker's leave balance of 83 hours as of June 30, 2012 (which is the equivalent of approximately two weeks' pay, assuming a 40-hour work week).

In response, OEA filed a Statement in Lieu of Brief, which indicated that it would rely on the ALJ's Initial Decision on Remand. *See generally* Office of Employee Appeals' Statement in Lieu of Brief.

Ms. Straker's brief as an intervenor would have been due on April 28, 2017, but she failed to file a response to the petition for review. On June 30, 2017, the Court held a status hearing, at which Ms. Straker's counsel did not appear. The Court's attempt to contact Ms. Straker's counsel by telephone, in open court, was unsuccessful. In light of Ms. Straker's failure to file a notice of intent to intervene, failure to file a brief in this matter, and failure to respond to the Court's telephone call, the Court issued an order on July 5, 2017, ruling that Ms. Straker had waived her right to intervene in this matter.

STANDARD OF REVIEW

When reviewing a decision from an administrative agency, there is a "presumption of correctness of the agency's decision" and the burden is placed on the petitioner to demonstrate agency error. *See Cooper v. District of Columbia Dep't of Employment Servs.*, 588 A.2d 1172, 174 (D.C. 1991). The Court may not set aside an agency decision if it is "supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." *See* Super. Ct. Civ. R. Agency Review 1(g). If substantial evidence supports the agency's findings, the Court must affirm the agency decision even though contrary evidence may also exist in the record. *See Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995). "The corollary of this proposition, however, is that we are not obliged to stand aside and affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law." *See Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161, 1166 (D.C. 1991).

ANALYSIS

The ALJ's Initial Decision on Remand exceeded the scope of the Board's remand. The Board remanded the case for the ALJ to determine Ms. Straker's leave status, and to apply any outstanding leaving balance to the period from June 2, 2012, to June 20, 2012, when Ms. Straker should have been on enforced leave. *See* A.R. at 308-09. Although the ALJ did calculate the leave balances and appropriately determined that Ms. Straker was not entitled to any additional payment between June 2, 2012, and June 20, 2012, the ALJ took the additional step of finding a violation of the CBA, and awarding Ms. Straker backpay for the period of June 21, 2012, to September 27, 2012, apparently as a remedy for MPD's violations of the CBA, D.C. Code § 1-616.54, and Ms. Straker's right to due process. A.R. 304. These additional rulings were beyond the scope of the remand order.

In accordance with the remand, the ALJ found that Ms. Straker had accrued 77 hours of annual leave as of June 16, 2012, and 83 hours as of June 30, 2017. *See* A.R. at 324. Although the Board's remand order directed the ALJ to apply these balances to the period between June 2, 2012, and June 20, 2012, the ALJ determined that it would be inappropriate to award Ms. Straker leave for that period because she had been on paid status until June 20, 2012. *See id.* It appears that these rulings fully satisfied the terms of the remand order and that the ALJ should have gone no further.

The ALJ, however, further determined that MPD had violated Article 12, Section 10, of the CBA when it failed to either return Ms. Straker to paid status or propose action within thirty days of the resolution of her indictment. *See* A.R. at 325. The ALJ determined that Ms. Straker was therefore entitled to backpay from June 21, 2012, to September 27, 2012. *See* A.R. 304. This issue was not within the scope of the remand, and MPD represents that none of the parties

raised this issue with the ALJ on remand.[6] According to applicable regulations, the ALJ's decision must contain: "findings of fact and conclusions of law, as well as the reasons or bases therefore, upon all the material issues of fact and law presented on the record." *See* 6 District of Columbia Municipal Regulations ("DCMR") § 631.2. Because the issue of whether MPD violated Article 12, Section 10, of the CBA was never "presented on the record," it appears that the ALJ's ruling in this regard was improper.

Further, the ALJ's remedy for the alleged violations of due process, the CBA, and the statute also exceeded the scope of the remand. In its remand order, the Board asserted that Ms. Straker was entitled to "backpay" in the form of accrued leave during the period between June 2, 2012, and June 20, 2012. *See* A.R. at 303-04. The ALJ's award of backpay between June 21, 2012, and September 27, 2012, went far beyond what the remand order contemplated. The amount awarded – approximately three months of backpay -- exceeded Ms. Straker's leave balance of approximately 83 hours; and also, without explanation, the ALJ awarded pay for the 30-day period before which Ms. Straker was entitled to be restored to paid status under the CBA. *See* A.R. 325 ("Employer agrees to return the officer to a pay status or issue notification of the charges and proposed action within thirty (30) business days of the date the indictment was either dropped or resolved.").[7]

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[6] The briefs filed on remand to the ALJ do not address the alleged CBA violation. Although the ALJ's first decision mentions the CBA, and both MPD and Ms. Straker discuss certain aspects of the CBA in their petitions and briefs, the specific CBA violation relied upon by the ALJ is never raised. *See, e.g.*, A.R. at 303 (noting that MPD relied on Article 12, Section 10 of its CBA to determine the appropriateness of its indefinite suspension of Ms. Straker).

[7] At the motion hearing on August 18, 2017, counsel for MPD stated that she was unsure whether Ms. Straker had, in fact, been paid for the period between June 20, 2012, and September 27, 2017, in compliance with the ALJ's order. The record reflects that Ms. Straker was paid her leave balances upon her resignation. Therefore, it is unclear whether MPD is entitled to require Ms. Straker to return any backpay that she received between June 21, 2012, and September 27, 2012. The Court leaves that determination to MPD's discretion.

For the foregoing reasons, the Court finds that the ALJ exceeded the scope of the Board's remand order. Accordingly, it is this 29th day of August, 2017, hereby

ORDERED that the petition for review is **GRANTED**; and it is further

ORDERED that the ALJ's Initial Decision on Remand dated June 27, 2016, is reversed and vacated.

SO ORDERED.

Judge Florence Y. Pan
Superior Court of the District of Columbia

Copies to:

Andrew G. Comentale, Esq.
Counsel for Petitioner

Lasheka Brown Bassey, Esq.
Counsel for Respondent

Attachment 21

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA PUBLIC SCHOOLS, ***Petitioner,*** **v.** **OFFICE OF EMPLOYEE APPEALS,** ***Respondent.***	**Case No. 2016 CA 7543 P(MPA)** **Judge Michael L. Rankin**

ORDER

District of Columbia Public Schools ("the petitioner" or "DCPS") appeals the District of Office of Employee Affairs ("OEA")'s decision to reinstate a DCPS teacher whose employment was terminated due to a negative performance evaluation. DCPS fired Cecile Thorne in 2013 after it rated her performance as "ineffective." DCPS argues that it evaluated Ms. Thorne's performance in accordance with its procedures and that OEA's reasoning is flawed. In response, OEA submitted a "Statement in Lieu of Brief," which refers the court to the OEA Board's September 13, 2016 Opinion and Order on Petition for Review. Having considered the instant petition, the September 13 Order, and the official record, the court finds that OEA's decision is clearly erroneous as a matter of law and lacks substantial factual support.

BACKGROUND

Before Ms. Thorne was fired, she taught early childhood and elementary school grade classes at the Marie Reed Learning Center. In July 2013, DCPS terminated Ms. Thorne's employment after it rated her performance rating for the preceding school year as "ineffective." At that time, DCPS reviewed teacher performance in accordance with "IMPACT," the employee evaluation system developed by the agency. Under IMPACT, teachers are placed into evaluation

groups based on their primary grade level of instruction and assessed under the criteria and procedures established for that group. Ms. Thorne appealed her termination to OEA arguing, *inter alia*, that DCPS evaluated her under the wrong IMPACT classification group. Ms. Thorne contended that she should have been placed in IMPACT Group 2a for the 2012-2013 academic year because she taught early childhood education. DCPS countered that Ms. Thorne was properly placed in Group 2 because she instructed multiple grade levels, and the majority of Ms. Thorne's time was spent teaching general education.

OEA concluded that Ms. Thorne was placed in the wrong IMPACT group because her Official Notification of Personnel Action Form ("SF-50") listed her position of record as "Early Childhood Education Teacher." It concluded that the failure to place Ms. Thorne in the correct IMPACT group was prejudicial error and ordered DCPS to reinstate Ms. Thorne with back pay and benefits. DCPS appealed the decision, arguing that District of Columbia law authorizes the agency to determine how it classifies its employees for evaluation purposes and that it complied with its procedures when it placed Ms. Thorne in IMPACT Group 2. OEA denied the petition.

LEGAL STANDARD

Pursuant to Rule 1(g) of the D.C. Superior Court Rules of Agency Review, the court reviews an agency decision "exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." D.C. Super. Ct. Agency Review R. 1. The court must "not disturb an agency's decision if it flows rationally from the facts which are supported by substantial evidence in the record of the agency." *Smallwood v. D.C. Metro. Police Dep't*, 956 A.2d 705, 707 (D.C. 2008). "The court's function is to determine if the requirements of procedural due process are met, and whether the decision of the agency is supported by

substantial evidence on the whole record." *Kegley v. District of Columbia*, 440 A.2d 1013, 1018 (D.C. 1982). An agency's legal conclusions "must be sustained unless they are '[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Rodriguez v. Filene's Basement Inc.*, 905 A.2d 177, 181 (D.C. 2006) (*quoting* D.C. Code § 2–510(a)(3)(A) (2001)).

DISCUSSION

DCPS argues that OEA's decision must be vacated because, *inter alia*, OEA erroneously found that a teacher's SF-50 form determines its proper IMPACT group placement. The court agrees.

As noted previously, OEA opted to re-submit its September 13 Order in lieu of filing an opposition. In the September 13 Order, OEA concluded that DCPS should not have classified Ms. Thorne's IMPACT group based on her teaching schedule because "[o]nly personnel action forms can alter the position of record for an employee." OEA interpreted cases reviewing Reductions in Force as establishing that an employee's SF-50 determines her official position of record. It thus concluded that DCPS was required to evaluate Ms. Thorne based on the position listed in her SF-50 form in 2013 – Early Childhood Education Teacher. OEA also interpreted IMPACT guidance documents as establishing that Ms. Thorne should have been placed in Group 2a for purposes of her evaluation because she taught early childhood education classes during the 2012 to 2013 school year. It quoted language from an IMPACT guidance document stating that "[a]ny teacher who teaches pre-school, pre-kindergarten, or kindergarten, except those who are special education teachers … should be placed in Group 2a." Finding that Ms. Thorne was "evaluated in the incorrect IMPACT group," OEA concluded that her termination violated the CBA between DCPS and WTU.

The court agrees with DCPS that OEA's decision is erroneous as a matter of law and lacks evidentiary support. Decisions interpreting RIFs are inapposite to the instant petition because Ms. Thorne was not terminated based on her position of record and the agency's staffing needs; she was terminated due to a negative performance evaluation conducted by the agency responsible for establishing and operating that evaluation system. OEA cites no authority for the notion that DCPS was required to develop IMPACT classification procedures that reflected an employee's position of record as listed on a personnel form. Furthermore, OEA's only reference to the record evidence of IMPACT procedures is misleading. The paragraph containing the quoted excerpt, when read in totem, does not apply to Ms. Thorne's employment situation in 2013. It reads:

> Any teacher who teaches pre-school, pre-kindergarten or kindergarten, except those who are special education teachers or ELL teachers, should be placed in Group 2a. Any teacher who teaches a K/1ST grade split class in which at least half of the students [are] in 1st grade should be placed in Group 2. The [Early Childhood Education] rubric should only be used for teachers who teach ECE students for the majority of their instructional time.

OEA ignored provisions in IMPACT guidance documents which specifically stipulate how school administrators should classify teachers like Ms. Thorne, who instruct multiple grade levels and therefore ostensibly could be placed in more than one IMPACT group. DCPS cited IMPACT guidance documents which plainly state that such teachers should be placed in the group pertaining to the grade level in which they spend the majority of their time teaching. DCPS submitted an affidavit from a DCPS official corroborating the petitioner's interpretation of IMPACT procedures. It presents evidence that Ms. Thorne spent the majority of her time during the 2012-2013 school year instructing elementary school grade levels. Perplexingly, OEA found the record to be "unclear [as to] why [Ms. Thorne] was placed in Group 2 for the 2012-2013 school year," without addressing the explanation offered by DCPS, the affidavit from the school

official, or language in the same guidance documents addressing Ms. Thorne's precise employment situation. Lastly, the court agrees with DCPS that OEA exceeded the scope of its review when it substituted its interpretation of IMPACT for that of the agency charged with developing and administering the evaluation system; IMPACT procedures were not before OEA to review, only DCPS' compliance with those procedures. See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). The record evidence compels the conclusion that DCPS evaluated Ms. Thorne's performance for the 2012-2013 school year in accordance with IMPACT. Accordingly, OEA reversed DCPS' decision to terminate Ms. Thorne's employment on an erroneous basis.

CONCLUSION

For the reasons stated above, the court concludes that OEA's decision in this employment dispute is clearly erroneous, lacks substantial evidentiary support, and exceeds the scope of OEA's review. Accordingly, it is this 7th day of September, 2017, hereby:

ORDERED, that the instant petition for review is **GRANTED**; and it is further

ORDERED, that OEA Board's September 13, 2016 Opinion and Order on Petition for Review is **VACATED**.

SO ORDERED.

Michael L. Rankin, Associate Judge

Copies to:
Counsel of Record
Via CaseFileXpress

Cecile Thorne
1211 Jefferson Street, NW
Washington, DC 20011

Attachment 22

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

LELONIE CURRY-MILLS, **Petitioner,** **v.** **DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH AND REHABILITATION SERVICES *et al.*,** **Respondents.**	**Case No. 2016 CA 003190 P(MPA)** **Judge Steven M. Wellner** **Civil Calendar 14**

ORDER

This case comes before the Court on a Petition For Review Of Agency Decision, filed April 28, 2016. Petitioner challenges the Initial Decision issued by the Office of Employee Appeals ("OEA") on March 30, 2016.[1] For the reasons stated below, the Petition is granted. The Initial Decision issued by OEA is reversed, and the matter is remanded to OEA for further action consistent with this decision.

I. BACKGROUND

A. Findings Of Fact

Neither party challenges OEA's Findings Of Fact, which this Court concludes are supported by substantial evidence in the record. The Findings Of Fact are adopted here and restated for reference, with footnotes omitted:

> 1. DYRS [or, "the Agency"] is the District of Columbia's cabinet level juvenile justice agency tasked with the responsibility of providing security, supervision, and rehabilitation service s for youth committed to its care and custody.

[1] OEA Matter No. 1601-0047-15.

2. Youth Development Representatives ("YDRs"), formerly known as Correctional Officers, are among the most essential staff at the Agency. YDRs are responsible for the "rehabilitation, direct supervision, and active positive engagement, and safety and security of youth" in the Agency's secure facilities.
3. Employee worked as a YDR with Agency since October 3, 2005.

4. Agency maintains personnel folders for every employee. Each personnel folder contains contact information provided by an employee upon his or her entrance of duty; all updates to this information, including address changes, are provided by the employee voluntarily.

5. Contact information for all Agency employees is also located in PeopleSoft, an electronic automated system that houses personnel information for the District of Columbia's 30,000 plus employees. District employees' address information is located in PeopleSoft.

6. On or around September 12, 2011, Employee was arrested and charged with an Assault with a Dangerous Weapon. Employee was placed into Pretrial Services Agency's (PSAs) High Intensity Supervision Program and ordered to abide by an electronically monitored curfew, abide by the stay away order, and submit to regular drug testing on a weekly basis.

7. As a result, Employee was placed on non-contact status on September 22, 2011, and directed to report to New Beginnings, a different facility from where she was originally assigned.

8. On September 23, 2011, Employee reported to New Beginnings and received a written notice proposing her placement on enforced leave. The notice pointed to Employee's arrest, her felony charge, and a relationship between the felony charge and her position as grounds for the proposed enforced leave.

9. The mailing address on the notice was 1218 Southern Avenue #103, Washington, DC 20032. This was Employee's correct mailing address as of September 23, 2011.

10. On September 30, 2011, Employee submitted a written response denying her criminal charges to the written notice. She wrote: "I am not guilty of the charges that stand before me.... My life should not be destroyed due to a crime that I have not been pr oven to have committed."

11. On October 19, 2011, Employee received a final written decision that she would be placed on enforced leave immediately. Thus, Employee ceased coming to work.

12. Throughout her employment with DYRS, Employee updated her address information in PeopleSoft when she changed addresses.

13. On February 7, 2012, Employee changed her address in PeopleSoft from 1218 Southern Avenue #103, Washington, DC 20032 to 1234 Southern Avenue, SE, Number 304, Washington, DC 20032.

14. When an employee makes an address change in the PeopleSoft System, the system does not send notification to the employee's agency. Employee did not separately inform DYRS of the address change made in PeopleSoft.

15. On or around August 29, 2012, Employee was indicted on felony charges for (1) assault with a dangerous weapon, (2) Possession of a firearm during the time of violence, (3) Carrying a pistol without a license outside the home/business, and (4) threatening to kidnap or injure a person.

16. Employee's February 7, 2012 change of address to 1234 Southern Avenue, SE, Number 304, Washington, DC 20032 in PeopleSoft was available to DYRS in November and December of 2013.

17. Employee received hours-and-earnings statements issued by the Office of Pay and Retirement Services from February 24, 2012 through at least January 2014, at 1234 Southern Avenue, SE, Number 304, Washington, DC 20032.

18. On November 4, 2013, the Agency issued a 15-day advanced written notice of proposal to remove Employee. Employee's proposed removal was based on the following causes: 1) An on-duty or employment-related act or omission that interfered with the efficiency and integrity of government operations: malfeasance; 2) An act which constitutes a criminal offense whether or not the act results in convictions; and 3) An on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: violation of the District's Employee Conduct policy as outlined in the District Personnel Manual ("DPM") and violation of the Youth Services Administration "YSA") policy 13-004-Employee Conduct policy, in effect in September 2011 and superseded by DYRS Policy #DYRS-010 on September 4, 2012.

19. Agency could have, but did not, use the PeopleSoft System to determine Employee's current address in 2013.

20. This notice was mailed by Federal Express. The address on the notice — 3422 22nd St., SE, Washington, DC 20020 — was incorrect, and the notice was returned to DYRS undelivered.

21. On November 18, 2013, the Agency mailed a second copy of the Advance Written Notice of Proposed Removal to Employee. The address on this notice — 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745 — was incorrect, and the notice was returned to DYRS undelivered.

22. On December 11, 2013, the Hearing Officer assigned to review the case found that there was sufficient cause to warrant the removal of Employee from her position. The

Hearing Officer issued a report recommending that DYRS uphold Employee's proposed removal. The report noted that the November 4, 2013 Advance Written Notice was returned undelivered and "multiple attempts were made to deliver the Notice to Employee's addresses on record with the DYRS Office of Human Resources; however, the correspondence was returned undelivered."

23. On December 24, 2013, DYRS sent Employee a Final Written Notice of Proposed Removal removing her effective January 10, 2014, and mailed it to Employee. DYRS noted Employee's failure to respond to the Advance Written Notice. The address on the Final Written Notice — 1443 Southern Ave., Apt. 101, Oxon Hill, MD 20745 — was incorrect, and the notice was returned to DYRS undelivered.

24. The notice advised Employee that she could elect to file an appeal with the Office of Employee Appeals within thirty calendar days of the final decision or elect to file a grievance pursuant to the Negotiated Grievance Procedure of the collective bargaining agreement between Agency and Employee's union.

25. The December 24, 2013 Final Written Notice included a section about appealing to the Office of Employee Appeals ("OEA"). Labeled "Right to Appeal," it stated: "[Y]ou are entitled to appeal this removal action to the Office of Employee Appeals (OEA) within thirty (30) days of this final decision." The section also provided OEA's address, OEA's telephone number, and the instruction to call OEA for any questions about the OEA appeal process. Enclosed with the Final Written Notice were an OEA appeal form and a copy of the OEA regulations.

26. Agency used Employee's last known address based on their personnel records. Based on Agency's records, Employee never directly notified Agency of any change in mailing address or reached out to Agency after being placed on enforced leave since October 2011.

27. It is "not necessarily uncommon" for DYRS Human Resources staff to pull up employee address information from the PeopleSoft system. Agency could have checked Employee's contact information by looking in PeopleSoft and it would only take a DYRS Human Resources staff person a couple of minutes to retrieve an employee's address information from the PeopleSoft System.

28. Sometimes, the address information in PeopleSoft is inaccurate while the address information in an employee's personnel folder is accurate.

29. On February 27, 2014, a jury acquitted Employee on all felony counts, finding that she had acted lawfully in defense of her children.

30. On March 6, 2014, Employee appeared at the Agency, in person, more than 2 years since she last reported to work. Employee was informed by Agency's Management Liaison Specialist Ms. Ohler that she had been removed from her position.

31. Ohler also told Employee that the removal notices sent to the addresses DYRS had for her. When Employee informed Ms. Ohler that she did not receive any of the removal notices, Ohler stated that the notices were indeed returned undelivered.
32. Ms. Ohler then handed over the documents and Employee signed for and received copies of her Advanced Notice of Removal, Supporting Documents for Removal, Hearing Officer Report, and Final Notice of Removal. Ohler opined that while she advised Employee to reach out to OEA. Employee was not told that she had 30 more days to appeal from her receipt of the notices.

33. Together with Employee's December 24, 2013, Final Written Notice of Proposed Removal were the OEA appeal forms and a copy of the OEA regulations. The notice also advised Employee to contact the OEA at (202) 727 - 0004 if she need ed additional information on filing an appeal.

34. It was not until February 27, 2015, more than a year after the effective date of her termination, and more than eleven months after she signed for her notice of the separation, that Employee filed [her appeal to OEA].

B. Agency Decision

OEA dismissed as untimely Petitioner's appeal of the Final Written Notice of Proposed Removal. Senior Administrative Judge Joseph E. Lim concluded that Petitioner had missed the 30-day jurisdictional appeal deadline set by D.C. Code § 1-606.03(a): "Any appeal shall be filed within 30 days of the effective date of the appealed agency action."

The Administrative Judge agreed with Petitioner that the appeal deadline did *not* begin to run when DYRS mailed copies of its Final Written Notice Of Proposed Removal to various "wrong" addresses – addresses from which the U.S. Postal Service had returned Petitioner's mail as undeliverable. Citing *Jones v. Flowers*, 547 U.S. 220, the Administrative Judge found such notice constitutionally inadequate because the Agency had not "exercise[d] due diligence" to find a good address for Petitioner after mail sent to other addresses was returned as undeliverable. Initial Decision at 9.

The Administrative Judge nevertheless concluded that the appeal deadline *did* start to run on March 6, 2014, when Petitioner reported for work after a more-than-two-year absence and

received by hand a copy of the Final Written Notice Of Proposed Removal, with appeal rights. *Id.* He found that this notice, considered together with the Management Liaison Specialist's recommendation that Petitioner "reach out to OEA" for more information about the appeal process, was both constitutionally and statutorily adequate to trigger the 30-day jurisdictional appeal deadline. He acknowledged that more than 30 days had already passed since the date of the Final Written Notice of Proposed Removal and the effective date of her removal. He also acknowledged that neither the Management Liaison Specialist nor any other official had advised Petitioner of any new appeal deadline. He noted, however, that Petitioner was then on notice that her time to appeal was limited and that she could make inquiries about the appeals process at OEA. She therefore had an obligation, the Administrative Judge concluded, to file an appeal within 30 days or lose the right to appeal altogether.

The Administrative Judge also considered but rejected Petitioner's argument that the appeal deadline was not jurisdictional and that notions of fairness – specifically, principles underlying the equitable tolling doctrine – might require extension of the deadline to accommodate the unusual circumstances of the case. His reasons for rejecting that argument appear two-fold: First, he noted that the Court of Appeals has repeatedly held "that the time limit for filing an appeal with an administrative adjudicatory agency such as [OEA] is mandatory and jurisdictional in nature" and that equitable tolling was not available in such cases. Initial Decision at 13. Second, or perhaps in the alternative, he found that Petitioner had not demonstrated the "due diligence" necessary to warrant tolling of the deadline even if such equitable relief was available. *Id.*

II. LEGAL STANDARD

In reviewing an agency ruling, the Court must "base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial

evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Agency Rev. R. 1(g). The Court may set aside any agency findings and conclusions that are

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) Contrary to constitutional right, power, privilege, or immunity;
(C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;
(D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or
(E) Unsupported by substantial evidence in the record of the proceedings before the Court.

D.C. Code § 2-510 (a)(3).

The Court will not overturn an agency decision if the "decision flows rationally from the facts, and those facts are supported by substantial evidence on the record." *Upchurch v. D.C. Dep't of Empl. Servs.*, 783 A.2d 623, 627 (D.C. 2001). But if the question is one of law, the judicial branch "remains 'the final authority on issues of statutory construction.'" *Id.* (quoting *Genstar Stone Prods. v. D.C. Dep't. of Employment Servs.*, 777 A.2d 270, 272 (D.C. 2001)); *see also Georgetown Univ. v. D.C. Dep't. of Employment Servs.*, 862 A.2d 387, 391 (D.C. 2004) ("The agency's legal conclusions are entitled to less deference than its factual findings because of the court's legal expertise.") "Generally, this court will defer to the agency's interpretation of the statute and regulations it administers unless its interpretation is unreasonable or in contravention of the language or legislative history of the statute and/or regulations." *Georgetown*, 862 A.2d at 391 (internal citations omitted).

III. DISCUSSION AND ANALYSIS

As a preliminary matter, this Court agrees with OEA that the appeal deadline at issue is jurisdictional. As the Administrative Judge correctly states in his Initial Decision, the Court of Appeals has repeatedly (and recently) held such appeal deadlines jurisdictional. *See, for example, Yates v. United States Dep't of the Treasury*, 2016 D.C. App. LEXIS 422 (D.C. Nov.

23, 2016) (acknowledging that the characterization of such deadlines as jurisdictional remains the law); *Getachew v. Shoreham*, 2014 D.C. App. LEXIS 604 (D.C. Dec. 15, 2014) (affirming an administrative decision dismissing a late unemployment appeal for lack of jurisdiction); and *Hoggard v. District of Columbia Pub. Employee Relations Bd.*, 655 A.2d 320 (D.C. 1995) (analogous deadline for appeals to the D.C. Public Employee Relations Board is jurisdictional). Although the Court of Appeals has questioned whether this rule might warrant reconsideration under principles recently articulated by the Supreme Court,[2] as of today the rule is that such deadlines are, in fact, jurisdictional. *Id.*

This Court also agrees with OEA that notice sent to Petitioner and returned as undeliverable was not Constitutionally effective to trigger an appeal deadline. *See Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1087 (D.C. 2007) (citing *Jones v. Flowers*, 126 S. Ct. at 1716-18, for the rule that an order and appeal rights returned to an administrative agency as undeliverable is insufficient to trigger a jurisdictional appeal deadline). Given the ready

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[2] We have consistently held that the statutory "[time] period provided for administrative appeals under [the D.C. Unemployment Compensation Act] is jurisdictional, and failure to file within the period prescribed divests the agency of jurisdiction to hear the appeal." *Chatterjee v. Mid Atl. Reg'l Council of Carpenters*, 946 A.2d 352, 354 (D.C. 2008) (quoting *Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 345 (D.C. 2006)). *Savage-Bey* argues that this holding has been called into question by doctrinal developments in recent Supreme Court decisions, including *Henderson v. Shinseki*, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) (clarifying the distinction between claims-processing rules and jurisdictional limits), and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (recognizing that limitations periods fall into two categories: claims-processing rules that are subject to equitable tolling, and jurisdictional limits that cannot be extended for equitable reasons). Because we conclude in any event that the appeal should not have been dismissed as untimely, we agree with *Savage-Bey* that we need not [revisit with] this case whether the time limit is jurisdictional.

Savage-Bey v. La Petite Acad., 50 A.3d 1055, 1060 (D.C. 2012).

availability and routine use of the PeopleSoft database for this purpose, the Agency had an obligation to do more than it did to serve notice of this important action on Petitioner.

The only remaining questions in this case, then, are when Petitioner's appeal deadline was triggered and whether Petitioner appealed within the time allowed by law.[3] On these two points, this Court parts company with OEA.

OEA concludes that Petitioner received constitutionally and statutorily adequate notice of her appeal rights when she finally received by hand, on March 6, 2014, a copy of the Final Notice of Proposed Removal and its 30-day appeal rights language. At oral argument, OEA emphasized that Petitioner knew at that moment that OEA had rendered a final decision terminating her employment. But the Court of Appeals has repeatedly made clear that giving "notice" in these circumstances requires not only the communication of information about the effect of the decision but also the communication of unambiguous information about appeal rights. *See Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 217 (D.C. 2009) ("notice must unambiguously set forth the conditions for filing an appeal") and many cases cited therein; *Lundahl v. District of Columbia Dep't of Employment Services*, 596 A.2d 1001, 1002-1003 (D.C. 1991) ("a prerequisite to the jurisdictional bar is notice to the claimant of the decision *and* of any right to an administrative appeal of the decision") (internal citations omitted; emphasis supplied); *McDowell v. Southwest Distrib.*, 899 A.2d 767, 769-770 (D.C. 2006) (appeal deadline not triggered by ambiguous deadline).

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[3] Given the decision reached here, there is no need to address the issue of equitable tolling raised by the Administrative Judge and rejected by him as a basis to extend a *jurisdictional* appeal deadline. This Court notes, however, that the Court of Appeals has raised the possibility that the equitable doctrine of unique circumstances, or lulling, might be applicable even in cases involving jurisdictional appeal deadlines. *McDowell v. Southwest Distrib.*, 899 A.2d 767, 770 (D.C. 2006). *See Kamerow v. D.C. Rental Hous. Comm'n*, 891 A.2d 253 (D.C. 2006) (setting out the elements of a "lulling" claim).

In this case, Petitioner received only a puzzling message about her appeal rights on March 6, 2014. A plain reading of the Initial Decision and the appeal rights would have indicated that the appeal deadline had already passed. Whether that even constitutes "ambiguity" – Petitioner's counsel suggested at oral argument that the notice was *un*ambiguously wrong – ambiguity was certainly introduced when DRYS's Management Liaison Specialist contemporaneously suggested, apparently without much optimism,[4] that Petitioner contact OEA to find out whether she could still appeal. *See Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 346 (D.C. 2006) ("we have also held that ambiguity was compounded when employees of the administrative agency gave erroneous oral or written advice to the claimant"); *Selk v. D.C. Dep't of Empl. Servs.*, 497 A.2d 1056 (D.C. 1985) (incorrect information from agency representative rendered appeal rights ambiguous); and *Ploufe v. D.C. Dep't of Empl. Servs*, 497 A.2d 464, 466 (D.C. 1985) (ambiguity in appeal deadline introduced by incorrect advice from agency official).

OEA therefore erred in holding that Petitioner's 30-day appeal period ran from March 6, 2014. On March 6, 2014, she would at best have been confused. She was holding a paper that at least implied her appeal deadline had passed. An agency representative had told her that "she believed Employee's time to appeal had lapsed" but nevertheless suggested Petitioner inquire further. Initial Decision Finding # 32. Whatever all that might mean to a sophisticated lawyer when considered in light of the applicable appeal statute, case law and the Constitution, it does not constitute notice to Petitioner that her appeal deadline ran from that date. It also does not mean the appeal deadline actually ran from that date as a matter of law.

It is true that as of March 6, 2014, Petitioner was on notice that she was the aggrieved subject of an administrative decision. And there may be a point beyond which a general statute

[4] *See* Administrative Judge's Finding #32.

of limitations or the concept of laches might render the Final Written Notice of Proposed Removal unchallengeable. Respondent identified no statute or case law from which such a date could be drawn in this case, however, or even in a hypothetical case where a decision was delivered without appeal rights at all.[5] Respondent argues that it has been prejudiced by Petitioner's delay in appealing,[6] but the reference to a "delay" only highlights the parties' different perspectives. As far as the record reveals, Petitioner has never received clear notice of her appeal rights. From Petitioner's perspective, then, there has been no "delay." It is possible that in some other case, the passage of time might result in a fundamental unfairness to an agency faced with an appeal long after it failed to give timely notice of appeal rights. The passage of time in such a case might warrant special scrutiny, especially if the record contained evidence of bad faith by the appellant. In this case, however, the delay was not so extraordinary that the usual principles of ambiguous notice should not apply.

In sum, Petitioner received only ambiguous notice of her appeal rights, and her appeal on February 27, 2015 – before the ambiguity was cured – was therefore timely. The Initial Decision of OEA is reversed.[7] The case is remanded to OEA for further proceedings consistent with this decision.

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[5] Respondent has not suggested, and the case law would not support the argument, that Petitioner was on constructive notice of the appeal deadline based on the statute, regulations or other publicly available information.

[6] At oral argument, counsel for Respondent indicated that the passage of time might adversely affect the Agency's ability to collect and present evidence.

[7] OEA's Initial Decision sets out in a footnote some of the Administrative Judge's analysis of the merits of Petitioner's appeal. This Court expresses no opinion as to that analysis.

IV. CONCLUSION AND ORDER

For the foregoing reasons, the Petition For Review Of Agency Decision is **GRANTED**, the Initial Decision issued March 30, 2016, is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this order.

DATED: December 22, 2016

Steven M. Wellner
Associate Judge

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Attachment 23

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DONALD FRAZIER	:	Case Number: 2016 CA 874 P (MPA)
v.	:	Judge: Florence Y. Pan
OFFICE OF EMPLOYEE APPEALS	:	

ORDER

This matter comes before the Court upon consideration of petitioner's Petition for Review of Agency Decision, filed on February 5, 2016; petitioner's first Amended Petition for Review of Agency Decision, filed on June 13, 2016 (hereinafter "First Amended Petition"); petitioner's second Amended Petition for Review of Agency Decision, filed on June 22, 2016 (hereinafter "Second Amended Petition"); petitioner's Brief, filed on October 19, 2016; respondent's Brief in Opposition, filed on November 18, 2016; petitioner's Reply Brief, filed on December 19, 2016; Intervenor-Agency's Motion to Dismiss, filed on February 10, 2017; and petitioner's Opposition to Intervenor-Agency's Motion to Dismiss, filed on March 21, 2017.[1] The Court has considered the pleadings of the parties, as well as the relevant law. For the following reasons, the proceedings before this Court are stayed, and the case is remanded to the Office of Employee Appeals ("OEA") so that OEA may determine whether it had jurisdiction over petitioner's appeal.

PROCEDURAL HISTORY

Petitioner is a former employee of D.C. Public Schools (hereinafter "DCPS") who was terminated from his teaching position for failure to comply with the District of Columbia's licensure requirements on July 14, 2012. *See* Opinion and Order on Petition for Review of the OEA, dated January 5, 2016, p. 1. On July 23, 2012, petitioner challenged his termination by

[1] Petitioner labels this filing as an Answer, but the Court will refer to it as an Opposition for clarity of the record.

filing a Petition for Appeal with the OEA, asserting that he received conflicting information during the hiring process regarding the status of his teaching license. *Id.* On March 31, 2014, an OEA administrative judge issued an Initial Decision upholding the decision of the D.C. Public Schools to terminate petitioner, based on a finding that petitioner "failed to obtain the necessary teaching credentials in Health and Physical Education," and that petitioner did not comply with the applicable D.C. Municipal Regulation (hereinafter "DCMR"), which provides that "an individual shall hold a teaching credential to serve as a teacher in the District of Columbia Public Schools for the sub-specializations enumerated in this section."[2] *Id.* at 2.

On April 31, 2014, petitioner filed a Petition for Review with the OEA Board, asserting that the OEA administrative judge did not address every issue that he raised in his appeal, and reiterating that he relied on representations made to him during the hiring process to inform his belief that he satisfied all requirements for teachers in the District of Columbia. *See* Employee Appeal of Initial Decision, dated April 31, 2014. Specifically, petitioner requested that the OEA Board reverse the Initial Decision and reinstate his former employment with benefits and back-pay from the date of his termination. *Id.* at 4. On January 5, 2016, the OEA Board upheld petitioner's termination, and denied his petition for review on the ground that his "failure to obtain the license is adequate cause to remove him from his position in accordance with DCMR 5-A1601.1;" further, the OEA Board found that the administrative judge's initial decision was based on substantial evidence. Opinion and Order on Petition for Review of the Office of Employee Appeals, dated January 5, 2016, p. 4.

On February 5, 2016, petitioner filed a Petition for Review of Agency Action in this Court, against defendant DCPS, pursuant to the Merit Personnel Act. On May 13, 2016, at an

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[2] Pursuant to DCMR 5-A1602.1, health and physical education are both enumerated sub-specializations requiring a teaching credential.

initial scheduling conference, the Court informed petitioner that he had filed his action against the wrong defendant. *See* Docket Entry, 2016 CA 874 P(MPA), dated May 13, 2016 (Irving, J.). On June 13, 2016, petitioner filed his First Amended Petition, which named OEA as a defendant. On June 17, 2016, the Court admonished petitioner that he needed to serve the proper party with his amended petition. *See* Docket Entry, 2016 CA 874 P(MPA), dated June 17, 2016 (Irving, J.). Subsequently, on June 22, 2016, petitioner filed his Seconded Amended Petition, which he served on defendant OEA on June 28, 2016. *See* Affidavit of Service by Certified/Registered Mail, 2016 CA 874 P(MPA), dated August 1, 2016. On August 5, 2016, defendant OEA filed the Agency Records for the Court's review.

On August 19, 2016, the Court set a briefing schedule for the parties to address the merits of petitioner's appeal of agency action. *See* Docket Entry, 2016 CA 874 P(MPA), dated August 19, 2016 (Irving, J.). On October 19, 2016, petitioner filed a brief asserting wrongful termination by DCPS, and raised for the first time the additional claim of promissory estoppel. *See* Brief, at 1. On November 18, 2016, respondent filed its opposition to petitioner's petition for review of agency decision, asserting that substantial evidence existed to support the agency's decision and consequently, the Court must uphold its decision. *See* Opposition, at 3.[3] Respondent also asserted that petitioner's promissory estoppel claim must fail because it was raised for the first time on appeal. *See* Opposition, at 5. On December 19, 2016, petitioner filed his answer to respondent's opposition, which argues that the agency's decision must be overruled as it was clearly erroneous, and was made after substantial evidence was ignored. *See* Answer, at 2-3.

[3] Although OEA is the named defendant, the opposition was filed by DCPS as "respondent" in this matter. *See* Respondent's Brief in Opposition to Petition for Review of Agency Decision, filed by DCPS.

On February 10, 2017, DCPS filed a motion to dismiss petitioner's petition for review of the agency decision on the ground that OEA did not have jurisdiction to decide petitioner's appeal of his termination in the first place. *See* Mot. to Dismiss at 1.[4] DCPS asserts that an employee who lacks the proper licensure to teach is an at-will employee, subject to discharge from his position at any time. *See* Mot. to Dismiss at 3. Further, DCPS contends that OEA does not have jurisdiction to review an appeal filed by an at-will employee. *See* Mot. to Dismiss at 3.

On February 14, 2017, the Court issued an order holding in abeyance petitioner's petition for review in light of its receipt of DCPS's motion to dismiss. *See* Order, dated February 14, 2017. The Court noted that DCPS had not formally moved to intervene in the matter, nor had it sought leave of Court to file such an untimely motion to dismiss petitioner's petition on jurisdictional grounds, but exercised its discretion to consider the motion. *See id.*

On March 21, 2017, petitioner filed an opposition to DCPS's motion to dismiss. In his opposition, petitioner asserts that OEA's rules permit a District of Columbia employee to appeal a final agency decision; further, because DCPS removed him from his position, the OEA must have had jurisdiction to review his appeal. *See* Opp. at 2. Petitioner did not address DCPS's argument regarding his status as an at-will employee, nor the scope of OEA's jurisdiction over at-will employees.

ANALYSIS

An employee challenging his termination to the OEA has the burden of proof to establish that OEA has jurisdiction over his appeal. *See* OEA Rule 692.2, 46 D.C. Reg. 9297 (1999) ("The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing."). The OEA has no authority "to review issues beyond its jurisdiction...therefore issues

[4] DCPS referred to itself as "intervenor agency," even though it was the agency that filed the opposition to petitioner's original petition.

regarding jurisdiction may be raised at any time during the course of the proceeding." *See* OEA Governing Statutes and Jurisdiction, *available at* http://oea.dc.gov/page/issues-regarding-jurisdiction. Ordinarily, after the OEA serves an employee's petition for appeal on the agency that made the challenged employment decision, "[if] the agency believes that the appeal is beyond the jurisdiction of OEA, [it] may file a motion to dismiss the appeal for lack of jurisdiction." *See* OEA Employee Appeals Process, *available at* http://oea.dc.gov/node/68202.

In this case, DCPS filed its motion to dismiss for lack of jurisdiction in this Court, in the midst of petitioner's appeal of OEA's decision. OEA already has reviewed petitioner's termination, and has issued both an Initial Decision and a Final Decision, upholding DCPS's termination of petitioner for failure to obtain a license to teach within the time allowed. Although the motion to dismiss is clearly belated, this Court is obligated to consider it because subject matter jurisdiction cannot be waived. *See, e.g.*, Super. Ct. Civ. R. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action."); *Customers Parking, Inc. v. District of Columbia*, 562 A.2d 651, 654 (D.C. 1989) (referring to "the oft-stated axiom that lack of subject matter jurisdiction can be raised any time, even by this court itself, *sua sponte.*"); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976) ("Parties cannot waive subject matter jurisdiction by their conduct or confer it on the court by consent, and the absence of such jurisdiction can be raised at any time.")

The Court remands the matter to OEA to determine whether it has jurisdiction over petitioner's appeal of his termination. The jurisdictional issue has been raised for the first time on appeal, and has not been considered by OEA. The determination of "whether the OEA has jurisdiction is 'quintessentially a decision for the OEA to make in the first instance.'" *See Grillo v. District of Columbia*, 731 A.2d 384, 386 (D.C. 1999), (quoting *Taggart-Wilson v. District of*

Columbia, 675 A.2d 28, 29 (D.C. 1996)). Courts should defer to an agency's own interpretation of the statute that it administers, in particular, on the question of "whether appellant's complaint is subject to the processes of the [Comprehensive Merit Personnel Act] and to what extent, including the right of substantive review by the OEA." *See Taggart-Wilson v. District of Columbia*, 675 A.2d 28, 29 (D.C. 1996). As long as an agency's interpretation of its jurisdiction is reasonable, consistent with the statute, and not plainly erroneous, the Court will defer to it. *See Davis v. Univ. of the Dist. of Columbia*, 603 A.2d 849, 851 (D.C. 1992). The Court, therefore, remands the matter to OEA for consideration of whether OEA had jurisdiction to entertain petitioner's appeal.

Accordingly, it is this 4th day of April, 2017, hereby

ORDERED that the Court remands petitioner's petition to the OEA for a determination of its jurisdiction over the appeal; and it is further

ORDERED that the Court shall *sua sponte* stay further proceedings, including resolution of the motion to dismiss, in this Court until OEA decides the jurisdictional issue; and it is further

ORDERED that the status hearing scheduled for April 14, 2017, is vacated.

SO ORDERED.

Florence Pan

Judge Florence Y. Pan
Superior Court of the District of Columbia

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Attachment 24

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Ella B. Cuff **Petitioner** **v.** **District of Columbia Office of Employee Appeals, et al.** **Respondents**	**2016 CA 003043 P(MPA)** **Judge Robert R. Rigsby**

ORDER

This matter is before the Court on the Petitioner's Petition for Review of Agency Decision (the "Petition") filed by Ella B. Cuff ("Petitioner"), and the Opposition, filed by the District of Columbia Office of Employee Appeals ("OEA"). For the reasons set forth below, the petition is **granted.**

FACTUAL AND PROCEDURAL HISTORY

In 1987, Petitioner Cuff joined the District of Columbia Department of Real Estate Services (hereinafter "Agency") as a police officer. She was required to qualify to carry her service weapon bi-annually. The qualifying periods were from January 1 through June 31, and from July 1 through December 31. *See* Petitioner's Brief at 1.

Petitioner Cuff was assigned to the first phase of her firearms qualifications course, which was scheduled for February 17, 2011. Petitioner Cuff took the exam at an indoor range at the police academy under the supervision of Lieutenant Matthew Sheldon and Chief Firearms Instructor and Commander James Prentice. Petitioner Cuff failed to qualify on February 17, 2011 after six attempts. Petitioner Cuff was then served a Notice of Revocation of Police Powers and

surrendered her service weapon. Lieutenant Sheldon rescheduled Petitioner Cuff for a re-qualification attempt for February 22, 2011. At the re-qualification, Petitioner completed one passing score. Petitioner was then allowed to attend a mandatory forty hours of remedial classroom instruction. Upon the completion of the remedial training, Petitioner Cuff failed a second attempt for firearms qualification on March 3, 2011. *See* Petitioner's Brief at p2.

The Agency issued an Advance Written Notice of Proposed Removal which was received by Petitioner in person on August 8, 2011. A Notice of Final Decision was issued on September 30, 2011, sustaining Petitioner Cuff's removal for neglect of duty and incompetence. The Notice took effect on October 4, 2011. Petitioner Cuff filed a Petition for Appeal with OEA on October 14, 2011. On November 14, 2011, the Agency filed its Answer, stating that that it properly and reasonably moved to terminate Petitioner. *See* Intervenor's Brief at 2-3.

In early 2012, the Petitioner received retirement documentation from the Agency. Petitioner completed the paperwork with the assistance of the District of Columbia Human Resources Office, and asserted that she was not informed of the rights she would be forfeiting by completing the paperwork. *See* Petitioner's Brief at 3.

Petitioner alleges that, in late 2013, the parties agreed to settle the case, but that on February 27, 2014, the Agency filed an Amended Answer and a Motion to Dismiss, alleging that OEA did not have jurisdiction over Petitioner Cuff's appeal because she voluntarily retired. *Id.* at 3-4.

On March 4, 2014 the Administrative Judge directed the parties to submit briefs on jurisdiction. On June 30, 2014, the Administrative Judge issued an Initial Decision finding that OEA did not have jurisdiction because Petitioner had not put forth any evidence to show her retirement was wrongfully extracted by deception or coercive agency action which would render

her retirement involuntary for purposes of establishing jurisdiction." The Administrative Judge also relied on the Employee's Standard Form 50 ("SF-50") which "provided that the action taken was a retirement in lieu of involuntary action," and that "being faced with financial difficulties did not make Employee's retirement involuntary." The case was then dismissed for lack of jurisdiction. *See* Agency Record (hereinafter "R.") at 187-192.

On August 4, 2014, Petitioner Cuff filed a Petition for Review with the OEA Board, arguing that jurisdiction was properly established at the time she filed her Notice of Appeal on October 14, 2011. In this petition, she argued that the SF-50 contains contradictory language given "the form provides she retired in lieu of an involuntary action, and the retirement was based on discontinued service due to separation/termination. 260-261. On March 29, 2016, the OEA Board issued an Opinion and Order denying Petitioner Cuff's petition. *See* R. at 258-265. Petitioner Cuff now appeals the denial of her Petition for Review.

Standard of Review

Super. Ct. Agency Rev. R. 1(g) provides that the Superior Court "shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." *See also Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). In addition, the Court must "base its decision exclusively on the administrative record." Super. Ct. Agency Rev. R. 1(g); *see also Dupree v. District of Columbia Office of Emp. Appeals*, 36 A.3d 826, 830 (D.C. 2011) (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 n. 4 (D.C. 2006)) (further citation omitted) (explaining that the Court's review is confined "strictly to the administrative record," and the Court must affirm the decision "so long as it is supported by substantial evidence in the record and otherwise in accordance with the law."). In reviewing administrative appeals, the Court of Appeals has stated

that, "[t]o pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions must follow rationally from its findings." *Dupree*, 36 A.3d at 830 (quoting *Johnson v. District of Columbia Office of Emp. Appeals*, 912 A.2d 1181, 1183 (D.C. 2006)) (further citation omitted). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Hutchinson v. District of Columbia Office of Emp. Appeals*, 710 A.2d 227, 230-31 (D.C. 1998) (quoting *Davis-Dodson v. District of Columbia Dep't of Employment Servs.*, 697 A.2d 1214, 1218 (D.C. 1997) (further citations omitted). Evidence is not substantial if it is "so highly questionable in the light of common experience and knowledge that it is unworthy of belief." *District of Columbia General Hospital v. Office of Emp. Appeals*, 548 A.2d 70, 77 (D.C. 1988) (citing *Jackson v. United States*, 122 U.S. App. D.C. 324, 329 (1965)).

ANALYSIS

I. Petitioner's Jurisdiction Argument

Petitioner argues that subject-matter jurisdiction is established at the time of filing, and thus, OEA should not have denied her petition for lack of jurisdiction. *See Brown v. Hines-Williams*, 2 A.3d 1077 (D.C. 2010). She further argues that, under *Brown*, "the court's jurisdiction continues until the court has done all it can to determine all issues involved, and events that occur only after jurisdiction is acquired do not affect jurisdiction even if they would have deprived the court of jurisdiction in the first place." *Brown* at 1080. Thus, because subject-matter jurisdiction was established at the time Petitioner Cuff filed her petition for review, the court's jurisdiction would continue. Further, Petitioner Cuff points out that the Agency only contested subject matter jurisdiction over two years after she had filed her petition for review.

Additionally, Petitioner Cuff did not begin the retirement process until after she initiated her appeal and not until the District of Columbia Department of Human Resources reached out to her about retirement in February 2012.

The Agency argues that the petitioner voluntarily retired, which if found to be true, deprives the OEA of jurisdiction. The Agency cites to *Chase v. Public Defender Service*, 956 A.2d 67, 75 (D.C. 2008)(quoting *Customers Parking, Inc. v. District of Columbia,* 562 A.2d 651, 654 (D.C. 1989) which states that "[p]arties cannot waive subject matter jurisdiction by their conduct or confer it...by consent, and the absence of such jurisdiction can be raised at any time.").

The Court acknowledges the tension between *Chase* and *Brown* with respect to jurisdiction, but does not find this to be an accurate comparison. The Court acknowledges that *Chase* deals with an administrative agency's jurisdiction which is strictly limited by statute, whereas *Brown* relates to Superior Court jurisdiction over a domestic relations matter. This Court also acknowledges the deference that must be accorded to an agency's interpretation of its own statutes and rules: "an agency's interpretation of its own regulations or of the statute which it administers is generally entitled to great deference from the appellate court." *Panutat v. D.C. Alcoholic Bev. Control Bd.,* 75 A. 3d 269 (D.C. 2013). Prior OEA decisions also establish that jurisdictional issues can be raised at any time. *See Brown v. D.C. Public Schools*, OEA Matter No. 1602-0030-90 (September 30, 1992); *Banks v. D.C. Public Schools*, OEA Mater No. 1602-0030-90 (September 30, 1992); *Monu v. D.C. Public Schools*, OEA Matter No. 1601-0202-12 (March 11, 2014).

II. Petitioner's Allegation of Involuntariness

Given this Court's agreement with the Agency's argument that jurisdiction can be challenged at any time, this Court is now tasked with determining whether the Petitioner made a prima facie allegation of involuntariness that would entitle her to a hearing on this issue, given that the OEA has jurisdiction over a retirement that is deemed involuntary.

In *D.C. Metro Police Dep't v. Stanley*, 942 A.2d 1172 (D.C. 2008), the District of Columbia Court of Appeals, citing *Covington v. Dep't of Health & Human Servs.*, 750 F.2d 937 (Fed. Cir. 1984), overturned an OEA decision finding that petitioner had voluntarily retired. Petitioner, a Metropolitan Police Department Commander, had been summoned from home for an unscheduled meeting with the Assistant Chief of Police. At the meeting, Petitioner was informed that he was being replaced, effective immediately, and that he had to decide that same day whether to retire, accept a demotion to an unspecified position, or be fired. The Court recognized that, "MPD compelled [Petitioner's] fate in haste and ignorance," and the law requires "the choice be understood by the employee and...be freely made." *Id.* at 1178. Citing to *Covington*, the Stanley Court stated that, "[a] decision made 'with blinders on' based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness or due process. Accordingly, the Stanley Court held that the time pressure and informational disability undermined the administrative judge's determination that the retirement was voluntary. *Id.*

The *Covington* Court provides further instruction on the instant case, given its holding that an agency's failure to inform the petitioner "that a retirement election would preclude a later appeal denied him the right to consider this fact in making his decision." *Covington* at 943. The Covington Court also acknowledged that the administrative judge "issued a decision on the

merits of the jurisdictional issue, based solely upon the pleadings and written submissions of the parties," and that this "violated procedures required by law that guarantee an employee a hearing on the issue of involuntary retirement. *Id.* *(See also Dumas v. Merit Systems Protection Board,* 789 F.2d 892, 894 (Fed. Cir. 1986), stating "if the alleged facts are sufficient to support a prima facie case of involuntariness, the issue cannot be summarily determined adversely; the petitioner is entitled to an evidentiary hearing on the issue . . . . "). Finally, the Court in *Jenson v. Merit Systems Protection Board,* 47 F. 3d 1183 (Fed. Cir. 1995), held that, "[i]n determining involuntariness, the court must examine 'the surrounding circumstances to test the ability of the employee to exercise free choice,'" and that this issue is the "touchstone" of the analysis.

In this case, the Court finds that Petitioner has put forth a prima facie allegation of involuntariness that would entitle her to a hearing on this issue before the Administrative Judge. The OEA Board, citing to *Jenson,* stated that "[f]or a retirement to be considered involuntary, an employee must establish that the retirement was due to agency's coercion or misinformation upon which the employee relied." *See* R. at 262. Similarly, the Administrative Judge stated that "there is no credible evidence in the record to indicate that Agency unilaterally initiated the retirement process by informing Employee that she was required to retire from her position." *See* R. at 191.

Both the Administrative Judge and the OEA Board construed the case law too narrowly in stating that the employee must establish coercion or misinformation. Although these elements can factor into the analysis, *Stanley* and *Covington* both state that an employee can also establish that a retirement was involuntary if induced by the employer's withholding of information. In this case, Petitioner Cuff did not initiate the retirement process, and was not represented by counsel at the time the Agency initiated the retirement process. Further, the Agency initiated the

retirement process in February of 2012; Petitioner Cuff had filed her appeal on October 14, 2011 after her October 4, 2011 effective termination date. There is no evidence demonstrating that the Agency informed Petitioner Cuff that, by filling out the retirement documents, she would forfeit her pending appeal.

Indeed, for more than two years, the Agency did not take the position that Petitioner Cuff's retirement election would cause her to forfeit her pending appeal. If the Agency believed that Petitioner Cuff's retirement was voluntary, it makes little sense that they continued to engage in settlement negotiations with Petitioner Cuff after she filed her appeal on October 14, 2011, and for more than two years after the alleged retirement documents were filed in February of 2012. The Agency's February 27, 2014 Amended Answer and Motion to Dismiss raised, for the first time, the idea that OEA did not have jurisdiction over Petitioner Cuff's appeal because she voluntarily retired. Further, the language on the "Agency Checklist of Immediate Retirement Procedures" states the type of retirement as: "Discontinued service (Involuntary separation)." The Agency's argument that her retirement was voluntary directly contradicts the language of their own forms.

Accordingly, based on the entire record therein, it is this 17th day of April, 2017 hereby

ORDERED that the Petition for Review is **GRANTED**; it is further

ORDERED that the status hearing set for April 21, 2017 is **VACATED**; and it is further

ORDERED that this matter is remanded for a hearing so that the Administrative Judge can make a determination as to whether Petitioner Cuff's retirement was voluntary.

Robert R. Rigsby

Judge Robert R. Rigsby

Copies to all counsel of record.

Attachment 25

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DEPARTMENT OF MENTAL HEALTH, **Petitioner,** **v.** **D.C. OFFICE OF EMPLOYEE APPEALS,** **Respondent.**	**Case No. 2015 CA 007829 P(MPA)** **Judge Jennifer A. Di Toro**
DEPARTMENT OF MENTAL HEALTH, **Petitioner,** **v.** **D.C. OFFICE OF EMPLOYEE APPEALS,** **Respondent.**	**Case No. 2017 CA 002495 P(MPA)** **Judge John M. Campbell**

ORDER

This matter is before the Court on *Intervenor's Motion to Amend the Court's July 13, 2017 Order*, filed July 21, 2017. Petitioner filed an Opposition on August 4, 2017 and Intervenor responded on August 7, 2017. Intervenor requests that the Court amend its July 13, 2017 Order denying attorney's fees and remand to the Office of Employee Appeals (hereafter "OEA") on the issue of whether OEA is empowered to award attorney's fees for services rendered in Superior Court. Intervenor argues that remand is appropriate because this issue is currently pending before the OEA in the matter of *Rogers v. D.C. Public Schools,* OEA Matter No. 2401-0255-10-(2) AF16. Petitioner argues that there is no manifest error of law or fact that would warrant reconsideration under Super. Ct. Civ. R. 59(e). Additionally, Petitioner argues that a Rule 59(e) motion cannot be used to relitigate prior matters.

In the July 13, 2017 Order, this Court concluded that it was not authorized to award fees related to the review of agency decisions made by OEA. Specifically, the Court found that "no authority is conferred upon the Superior Court to award fees related to review of decisions made by the OEA" because the Court sits in the position of an appellate court when reviewing Merit Personnel cases. *See* July 13, 2017 Order. While Petitioner is correct that a Rule 59(e) motion cannot be used to relitigate matters, the Court does not view the instant motion in that light. In determining that it lacked jurisdiction, the Court therefore did not evaluate the OEA's authority to award attorney's fees for services rendered in the Superior Court. Therefore, the Court remands this matter to OEA to determine whether OEA is empowered to award attorney's fees for services rendered in Superior Court.

Accordingly, it is this 8th day of September, 2017, hereby,

ORDERED, that the motion is **GRANTED**. It is further

ORDERED, that the instant matter is remanded to the OEA for determination of whether OEA is empowered to award attorney's fees for services rendered in this Court. It is further

ORDERED, that this Court retains jurisdiction over all other matters in this action.

SO ORDERED.

Judge Jennifer A. Di Toro
Associate Judge
Signed in Chambers

Copies to:

Robert Fitzpatrick, Esq.
E-served via Casefile*express*
Counsel for Intervenor

Andrea Comentale, Esq.
E-served via Casefile*express*
Counsel for Respondent

Attachment 26

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Plaintiff	)	
	)	**Case No. 2016 CA 007541 P(MPA)**
v.	)	
	)	**Judge Neal E. Kravitz**
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,	)	
Defendant	)	

ORDER GRANTING PETITION FOR REVIEW OF AGENCY DECISION

Before the court is the petition of the District of Columbia Fire and Emergency Medical Services Department ("FEMS") for review of a final opinion and order of the District of Columbia Office of Employee Appeals ("OEA"). FEMS seeks review of OEA's order affirming the decision of an administrative judge ("AJ"). The AJ found that Edward Morgan, an employee of FEMS, was terminated for cause but in excess of the penalties permitted under the District Personnel Manual ("DPM") Table of Penalties, 6B DCMR § 1619 (2008) (current version at 6B DCMR 1607 (2016)). FEMS has filed a brief in support of its petition for review. OEA has filed a statement in lieu of a brief, stating that it rests on the final opinion of the OEA Board (the "Board").

Legal Standard

Rule 1(g) of the Superior Court Rules of Agency Review requires the court to base its consideration of the parties' petition and response "exclusively upon the administrative record" and provides that the court "shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law."

Discussion

As an initial matter, FEMS urges the court to find that OEA lacked jurisdiction to hear Mr. Morgan's appeal. FEMS argues that once Mr. Morgan's certification as an emergency medical technician expired, he became an employee at will with no attendant appeal rights to OEA. This is an issue of some potential complexity, but the court declines to address it at this time, as FEMS is not challenging the court's jurisdiction on this ground and FEMS did not present this argument to the AJ or the Board. As discussed below, the court is remanding the matter to the Board, and FEMS will be free to raise the issue of the Board's jurisdiction on remand.

On the merits, the court concludes that the Board committed clear error as a matter of law in deciding that FEMS waived certain arguments on appeal of the AJ's decision. In its initial brief before the AJ, FEMS defended its decision to remove Mr. Morgan and explained why the decision was appropriate under applicable law. FEMS acknowledged that the penalty imposed on Mr. Morgan exceeded that permitted by the DPM Table of Penalties and provided a legal rationale to justify its departure from the regulations. Specifically, FEMS argued that it correctly applied the so-called *Douglas* factors in making its decision and that, under the plain language and legislative history of the Emergency Medical Services Act of 2008 (the "EMS Act"), D.C. Code § 7-2341.01 *et seq.*, FEMS could not continue to employ Mr. Morgan after he failed to obtain the required certification to perform his job. In support of that latter point, FEMS cited legal authority stating that where a statute and a regulation conflict, the statute prevails.

In its petition to the Board, FEMS cited two OEA cases upholding an agency decision to remove an employee for a first offense of incompetence where an applicable statute required that result. The Board concluded that FEMS' argument was waived because it was not raised before the AJ.

This was clear error. FEMS raised the same argument before the AJ – that the decision to remove Mr. Morgan was appropriate under applicable law, because where the EMS Act and the DPM regulations conflict, the Act prevails – and FEMS was within its right to cite new authority consistent with the position it took before the AJ. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (Once a "claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *In re M.C.*, 8 A.3d 1215, 1223 (D.C. 2010) (quoting *Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992)) ("The determinative factor for purposes of preservation for appellate review is not whether counsel made every conceivable argument, but whether the trial judge was 'fairly apprised as to the question on which [she was] being asked to rule.'"). There was no waiver of FEMS' argument here.

Accordingly, it is this 22nd day of September 2017

ORDERED that the petition for review is **granted**. The final opinion and order of the District of Columbia Office of Employee Appeals is **reversed**, and the matter is **remanded** to the Board with instructions to proceed in a manner consistent with this order.

Neal E. Kravitz, Associate Judge
(Signed in Chambers)

Copies to:

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Lakesha Brown Bassey, Esq.
Via CaseFileXpress

Edward Morgan
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Via USPS

Attachment 27

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-CV-933

LAURA JACKSON, APPELLANT,

V.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,

and

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CAP-3442-13)

(Hon. Laura A. Cordero, Trial Judge)

(Argued May 2, 2017 Decided May 12, 2017)

Before FISHER and MCLEESE, *Associate Judges*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Laura Jackson challenges decisions of the Superior Court and the Office of Employee Appeals ("OEA") that upheld the termination of her employment pursuant to a reduction in force ("RIF"). We remand for further consideration in light of this opinion.

Appellant's primary argument is that the government did not properly calculate her service computation date ("SCD"), leading the Department of Health ("DOH") to separate her rather than another compliance specialist. In rejecting this claim, OEA principally relied upon 6-B DCMR § 2419.1, which provides that each employee's retention standing "shall be determined as of the date of release."

Based on its understanding of that regulation, OEA concluded that appellant's SCD could not be retroactively recalculated. Although OEA

acknowledged that appellant could conceivably "have been afforded additional credi[ta]ble service had she provided the proper documentation in a timely manner," it asserted that she had "mistakenly, and to her detriment, failed to provide any and all federal personnel forms to [the District of Columbia Department of Human Resources ("DCHR")] prior to the effective date of the RIF." The OEA therefore found that the government "had no basis for adjusting [appellant's] SCD . . . at the time the RIF became effective."

We find serious problems with this interpretation. The regulation identifies a benchmark date for purposes of determining each employee's retention standing. It does not state that a retroactive recalculation is prohibited, nor does it set a deadline for an employee to submit additional documentation.[1] Given the extreme importance of these factors in a fair administration of the RIF process, a regulation imposing such limitations on an employee's rights would have to be far clearer than that contained in the instant regulation. Neither the parties nor OEA have cited any other regulation or clear directive that requires an employee to come forward with evidence challenging her SCD before the RIF becomes effective. If such a provision exists, OEA may cite it on remand. We hold that OEA's interpretation of 6-B DCMR § 2419.1 was unreasonable, and we therefore cannot apply it in this appeal. *See, e.g., Foggy Bottom Ass'n v. District of Columbia Zoning Comm'n*, 979 A.2d 1160, 1167 (D.C. 2009) ("We will defer to the agency's interpretation of the statute and regulations it administers unless its interpretation is unreasonable . . . .").

Indeed, 6-B DCMR § 2405.7 provides that an employee may be retroactively reinstated when there has been "a harmful error as determined by the personnel authority or the Office of Employee Appeals." The error must "be of such a magnitude that in its absence the employee would not have been released from his or her competitive level." *Id.* Appellant has alleged that the government improperly calculated her SCD and that of Melvin Johnson, causing her to be

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[1] The government points out our decision in *Dupree v. District of Columbia Dep't of Corr.*, 132 A.3d 150, 158 n.34 (D.C. 2016), where we noted the possibility that the regulation "does not speak to the initial competition for retention standing at all, but merely establishes the effective date for determining retention standing in the event an employee is found to have been released due to an error in the register." The government has suggested that, in the event of a remand, we "may wish to direct OEA's attention to [this] alternative interpretation of 6B DCMR § 2419 for its consideration."

separated instead of him. If true, that mistake would presumably constitute "a harmful error" under § 2405.7.

We remand to OEA primarily so that it can address two issues. First, both appellant and the government have asserted that errors were made when calculating the SCDs of appellant and Mr. Johnson. For instance, the government states that appellant received six years of residency preference, rather than the three years that 6-B DCMR § 2418.1 seems to allow. It also notes that Mr. Johnson should have received a veteran's preference of four years under 6-B DCMR § 2417.5. Appellant, meanwhile, argues that there is no evidence of Mr. Johnson's employment with the government from 1997 to 2002 and that he has been given too much credit for military service because his form DD-214 indicates that he "lost" 215 days during certain periods from 1968 to 1971. These are all issues that OEA has not addressed.[2] It should do so on remand to ensure that the SCD calculations are correct and that appellant does in fact have a more recent RIF SCD than Mr. Johnson.

In its opinion, OEA indicated that it "does not retain the authority to alter another employee's personnel records" and that therefore "the calculation of [Mr. Johnson's] SCD with respect to the instant appeal is outside the purview of this Office's jurisdiction." However, OEA does not need to alter Mr. Johnson's records to decide this case. Instead, it must examine whether Mr. Johnson's SCD has been properly calculated based on documents already in his records. Indeed, it is hard to imagine how OEA could ensure the accuracy of the retention register—

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[2] OEA also briefly stated that appellant's "SCD as of the date of release was properly calculated by [DOH] based on the information contained in her official personnel file and [DCHR's] internal record keeping database." This statement is not supported by the record. First, appellant's entire personnel file does not appear in the record. Nor could Lewis Norman, the government's main witness at the OEA hearing, vouch for the contents of appellant's personnel file. He stated that he could not "recall" whether he had reviewed her personnel history when forming the retention register and that he was "not aware of any of her history." He also stated that he did not review the file while preparing for the hearing. One document that appears to be from appellant's personnel file, which she introduced during the OEA hearing as Exhibit 6, indicates that appellant filled out a "Statement of Prior Federal Service" when she began her employment with the District of Columbia government in 2001. OEA did not address the impact of this document in its reasoning.

and thus find that appellant has received her right to one round of lateral competition—without examining the SCD of an employee that appellant alleges should have been separated instead of her. Thus, OEA should address the accuracy of Mr. Johnson's SCD on remand.

OEA should also consider and explain what evidence the government must present to meet its burden of proof. OEA noted that appellant had the burden of proof as to issues of jurisdiction, but the "agency shall have the burden of proof as to all other issues." *See* 6-B DCMR § 628.2. The government presented testimony by DCHR employee Lewis Norman and documents such as the retention register. Mr. Norman appeared to have substantial knowledge of the process of conducting a RIF but little to no knowledge of appellant's case. He made no effort to demonstrate the accuracy of the SCDs on the retention register, and, as already noted, both parties have identified potential errors with those calculations. At times OEA appeared to place the burden on appellant to identify and correct any mistakes that she believed that the government had made when calculating her SCD. By pointing out these issues, we do not mean to limit OEA to any one outcome on remand. However, OEA should clarify exactly what the government must do to carry its burden.[3]

For the foregoing reasons, we remand this case to the Superior Court with directions to remand it to OEA for further proceedings not inconsistent with this opinion.

It is so ordered.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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[3] Appellant also complains that, during the RIF, she did not receive all the documents to which she was entitled. It appears that she has subsequently obtained many of these documents, including the final retention register and the OEA appeal form. We assume that appellant will have access to relevant records on remand.

Copies to:

Honorable Laura A. Cordero

Director, Civil Division

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General Assistant Counsel

Attachment 28

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Abraham Evans, **Petitioner-Employee,** **v.** **District of Columbia Office of Employee Appeals, *et al.*** **Respondents,** **and** **District of Columbia Metropolitan Police Department.** **Intervenor-Agency**	**2016 CA 007680 P(MPA)** **Hon. Elizabeth Wingo** **Next Event: Scheduling Conference** **Date: 10/13/2017 at 9:30 a.m.**

ORDER

UPON CONSIDERATION OF the foregoing Petitioner's Consent Motion to Remand Case to the D.C. Office of Employee Appeals, the information contained therein, and the record herein, it is this 3rd day of October, 2017 hereby

ORDERED that this matter is REMANDED to the D.C. Office of Employee Appeals; and it is further

ORDERED that the Scheduling Conference Hearing set for October 13, 2017, shall be **VACATED**.

It is so ORDERED.

JUDGE ELIZABETH WINGO
District of Columbia Superior Court

Copy via CaseFileXpress to:

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Counsel for Plaintiff

Joseph Mokodean, Esq.
Andrea Comentale, Esq.
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