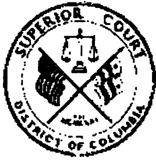
ATTACHMENT #25

2018 Superior Court Lawsuits

Form CA 1-A: Notice and Acknowledge for Service by Mail



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Aprille Washington
Plaintiff(s)

v. Case No: 2017 CA 3829

Office of Employee Appeals
Defendant(s)

NOTICE

To (insert name and address of the party to be served):
Office of Employee Appeals
1101 4th St. SW
Washington, DC 20020

The enclosed summons, complaint and initial order are served pursuant to Rule 4(c)(4) of the Superior Court Rules of Civil Procedure.

You must sign and date the Acknowledgement (below). If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate next to your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate next to your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days after it has been mailed, you (or the other party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons, complaint and initial order in any other manner permitted by law.

If you do complete and return this form, you (or the other party on whose behalf you are being served) must answer the complaint within twenty (20) days after you have signed, dated and returned the form. If you fail to do so, judgment by default may be entered against you for the relief demanded in the complaint.

This Notice and Acknowledgment of Receipt of Summons, Complaint and Initial Order was mailed on (insert date): September 5, 2017.

Adrienne J. Marsh
Signature

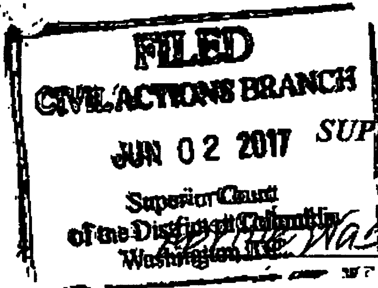
9/5/2017
Date of Signature

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS, COMPLAINT, AND INITIAL ORDER

I (print name) ______________________ received a copy of the summons, complaint and initial order in the above captioned matter at (insert address): ______________________

Signature | *Relationship to Defendant/Authority to Receive Service* | *Date of Signature*

Para pedir una traducción, llame al (202) 879-4828
如需翻译,请打电话 (202) 879-4828
Veuillez appeler au (202) 879-4828 pour une traduction
Để có một bài dịch, hãy gọi (202) 879-4828
[illegible] (202) 879-4828 [illegible]
번역을 원하시면, (202) 879-4828 로 전화주십시요



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Aprille Washington 3405 Texas Ave. SE, DC, 20020
Petitioner(s)

DC Public Schools/
v.

MPA No. 17-0003829

Office of Employee Appeals 1101 4th St. SW, DC 20024
Respondent(s)

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** Aprille Washington **appeals to the Superior Court of the District of Columbia from the order of** DC Public Schools **(agency or official's name), issued on the** 21 **day of** June**, 20**13**. A copy of that order or decision is attached to this petition.**
Description of Judgment or Order: ______

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: I was wrongfully terminated after filing a EEOC complaint with DCPS Labor and Management.

B. **Address of Respondent, Agency or Official:** 1200 First St, NE (DCPS) (OEA) 1101 - 4th Street, SW.

C. **Names and addresses of all other parties to the Agency's proceeding:** ______

D. **Names and address of parties or attorneys to be served:**

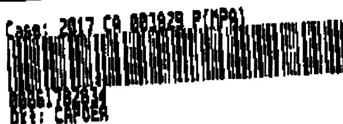
	NAME	ADDRESS
1.	Ranea Hawkins	441 - 4th Street, NW.
2.		
3.		
4.		

E. **A copy of the Agency's decision or Order sought to be reviewed is attached.**

______
Print name of petitioner's attorney

Aprille Washington
Signature of petitioner's counsel or petitioner's signature

Address: 3405 Texas Avenue, SE DC 20020
Bar No. ______ **Telephone No.** 202-581-2316



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

APRILLE WASHINGTON	:	Case Number: 2016 CA 4836
v.	:	Judge: Florence Y. Pan
D.C. PUBLIC SCHOOLS, ET AL	:	

ORDER

This matter comes before the Court upon consideration of defendants' Motion to Dismiss the Amended Complaint, filed on April 7, 2017. Plaintiff has not filed any opposition to defendants' motion to dismiss, and the time to file one has now passed. The Court has considered the pleading, the relevant law, and the entire record. For the following reasons, defendants' motion to dismiss is granted.

PROCEDURAL HISTORY

On July 1, 2016, plaintiff filed her original complaint against defendant District of Columbia Public Schools (hereinafter "DCPS"), asserting a claim of employment discrimination. *See* Original Complaint Information Sheet. In the complaint, plaintiff represented that she was filing an "EPA willful violation complaint," and asserted that she had been terminated from her employment on August 10, 2013, after filing an "EEOC complaint" with DCPS Labor and Management. *See* Original Complaint at 1. Further, plaintiff asserts that although her termination was upheld by the Office of Employee Appeals, the administrative judge who affirmed her termination "ignored [her] EEOC complaint." *See* Original Complaint at 1. On or around January 4, 2017, plaintiff amended her complaint to name the Office of Employee Appeals (hereinafter "OEA") as an additional defendant in the matter. *See* First Amended Complaint.

On January 4, 2017, plaintiff served her First Amended Complaint on both DCPS and OEA. *See, e.g.*, Affidavit of Service on OEA, dated January 4, 2017; Affidavit of Service on DCPS, dated January 4, 2017. On January 27, 2017, the Court held an initial scheduling conference. Defendant DCPS stated its intention to file a motion to dismiss plaintiff's First Amended Complaint, after plaintiff represented that she sought a reversal of the OEA decision and that she wanted to participate in mediation. The Court set a briefing schedule for the motion to dismiss.

On February 10, 2017, DCPS filed a motion to dismiss plaintiff's First Amended Complaint on the ground that plaintiff had already appealed OEA's final decision to uphold her termination, and that her appeal had been dismissed as untimely. *See, e.g.*, DCPS First Mot. to Dismiss at 1; Order Granting Dismissal, *Aprille Washington v. District of Columbia Public Schools*, 2016 CA 1557 P(MPA), dated July 1, 2016 (Ross, J.).[1] At a status hearing on March 10, 2017, the Court denied defendant DCPS's motion to dismiss the First Amended Complaint, based on plaintiff's representation that she did not intend in the instant action to appeal OEA's final decision upholding her termination. Plaintiff asserted, instead, that the instant case raises different issues, in a separate civil action. The Court therefore ordered plaintiff to file another amended complaint by March 24, 2017, clarifying the factual and legal nature of her cause of action.

On March 24, 2017, plaintiff filed her Second Amended Complaint. *See* Second Amended Complaint ("I am hereby amending my initial complaint to give clarity of my

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[1] On the same day that Judge Ross issued an order dismissing her appeal of OEA's final decision as "untimely filed," plaintiff filed the instant case.

intentions to this Court.").[2] Plaintiff alleges that she "experienced several tactics of retaliation by administrators before and after" she contacted "then-Chancellor Kaya Henderson about unlawful practices against" plaintiff and "the general educator in the classroom May 2011." *See* Second Amended Complaint ¶ 1. Plaintiff's Second Amended Complaint enumerates the alleged adverse employment actions that she suffered, mostly in the months of May and June, 2013.

Plaintiff alleges that she missed several days of work "due to a serious bacterial infection in [her] leg." Although plaintiff's sister notified the school about that medical leave, plaintiff was "AWOL'd from May 6-May 15 for those absences." *See* Second Amended Complaint ¶ 2-3.[3] On May 16, 2013, plaintiff returned to work after her absence. Although she had "several doctor's notes," she still received an "AWOL status" when "payroll was submitted on May 17, 2013." *See* Second Amended Complaint ¶¶ 4-5. Despite plaintiff's limited mobility and her inability "to physically sign in or out," DCPS did not give her any accommodations. *See* Second Amended Complaint ¶ 6. Plaintiff alleges that she "was paid with [her] sick and annual leave, even though [she] was present at work as a retaliation tactic." *See* Second Amended Complaint ¶ 6. In addition, plaintiff alleges that her "pay-step" increases were "withheld as a retaliatory practice." *See* Second Amended Complaint ¶ 9 ("From February 2009 until February 2013, I was paid at a step 6 after working 13 years. I should have been a step 9 under my contract which clearly states with 14 years of service, I would be a step 10.").[4] Finally, plaintiff asserts that she

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[2] Although plaintiff styled this filing as "Amendment to Initial Complaint," the Court will refer to it as the "Second Amended Complaint" to differentiate it from the First Amended Complaint.

[3] The Court deduces that being "AWOL'd" means being recorded as "Absent Without Leave." *See* Def. Mot. to Dismiss at 2.

[4] Although defendants also appear to have insufficient information to properly respond to this allegation, especially the accusation of "retaliation," they assert that, "assuming plaintiff was a member of the DCPS teachers' union, her GS pay increases were driven by the union contract." *See* Def. Mot. to Dismiss at 3.

was unable to submit her action to "mandatory mediation." *See* Second Amended Complaint ¶ 10.

On April 7, 2017, defendants filed the instant motion to dismiss the Second Amended Complaint, pursuant to Super. Ct. Civ. R. 12(b)(6). Defendants assert that plaintiff's Second Amended Complaint must be dismissed for three reasons: (1) defendants are "non-suable entities," as they are subordinate agencies to the District of Columbia; (2) plaintiff fails to state a claim upon which relief can be granted because the statute to which she cites does not exist;[5] and (3) plaintiff's claim is time-barred by the three-year statute of limitations. *See* Def. Mot. to Dismiss at 4-6.

. APPLICABLE LEGAL STANDARDS

Dismissal of a complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *See e.g.*, D.C. Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999). For example, a defendant may assert that a plaintiff's claim is time-barred because an affirmative statute of limitations defense can be used to "bar the claim for failure to state a claim upon which relief can be granted." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 734 (D.C. 2000). In deciding whether a complaint adequately states a claim that appears time-barred, a trial court can consider "the complaint and any documents attached to or incorporated in the complaint." *D.C. Water & Sewer Auth. v. Delon Hampton & Assocs.*, 851 A.2d 410, 417 (D.C. 2004).

[5] Plaintiff's Second Amended Complaint refers to a purported statute entitled, "EEOC Equal Pay Act Law," which defendants assert is "not an actual piece of legislation." *See* Def. Mot. to Dismiss at 5.

When considering a motion to dismiss a complaint for failure to state a claim, a Court must "construe the facts on the face of the complaint in the light most favorable to the non-moving party, and accept as true the allegations in the complaint." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A court should not dismiss a complaint merely because it "doubts that a plaintiff will prevail on a claim." *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997).

A pleading must contain a "short and plain statement of the claim showing that the pleading is entitled to relief." *See e.g.*, Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Plaintiffs who wish to survive a motion to dismiss under Super. Ct. Civ. R. 12(b)(6) must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (plaintiffs must "[nudge] their claims across the line from conceivable to plausible"). *See also Mazza v. Housecraft LLC*, 18 A.3d 786, 791 (D.C. 2011) (holding that "*Twombly* and *Iqbal* apply in our jurisdiction" because Super. Ct. Civ. R. 8(a) is identical to its federal counterpart). The "plausibility" pleading standard does not require "detailed factual allegations" at the initial litigation stage of filing the complaint, but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

ANALYSIS

Plaintiff's Second Amended Complaint must be dismissed because her claims are barred by the applicable statute of limitations.[6] Plaintiff's claim of employment discrimination must be

[6] Because the Court dismisses plaintiff's case based on the expiration of the statute of limitations, the Court need not address defendants' alternative grounds for dismissal. The Court notes, however, that it is unable to find

brought within three years "from the time the right to maintain the action accrues." *See* D.C. Code § 12-301(8) (setting a statute of limitations of three years for all causes of action not "specially prescribed" in the other subsections). The parties seem to agree that plaintiff's Second Amended Complaint relates back to her original Complaint, so that she is deemed to have brought the instant action on July 1, 2016. *See, e.g.*, Def. Mot. to Dismiss at 6 ("Plaintiff filed her original Complaint on July 1, 2016, so she is time-barred from challenging actions that occurred prior to July 1, 2013."); Second Amended Complaint ("I filed on July 1, 2016, and the date of my last paycheck is July 12, 2013."). Thus, to survive a motion to dismiss based on the statute of limitations, plaintiff's complaint must allege conduct that took place within the three years preceding July 1, 2016 -- *i.e.,* on or after July 1, 2013. Plaintiff's factual allegations, however, describe conduct that occurred in May and June of 2013.

Plaintiff appears to argue that her claim is timely because she received her last pay-check from DCPS within the statutory period, on July 12, 2013. *See* Second Amended Complaint at 2 ("I have within three years of my last paycheck of the violation to file with the courts. I filed on July 1, 2016, and the date of my last pay check is July 12, 2013."). Defendants assert, however, that plaintiff's "right to maintain an action challenging any [discrete] act of misconduct related [to] her pay grade and step, or her attendance record and leave usage," accrued before July 1, 2013, and that it "does not matter that [plaintiff] received her last paycheck on July 12, 2013." *See* Def. Mot to Dismiss at 6. The Court agrees with defendant. Although plaintiff's Second Amended Complaint does not plead a clear case of retaliation, it does make several allegations of

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that plaintiff adequately stated a claim upon which relief can be granted, because the statutory basis for her claim is unclear. Further, the Court does not find that plaintiff's factual allegations are sufficiently pleaded to allow the Court to infer liability on the part of defendants, despite plaintiff's additional opportunity to amend her complaint. Finally, although the Court tends to agree with defendants' assertion that they are *non sui juris* agencies, this defect could have been remedied by substituting the District of Columbia as defendant, had plaintiff's claims otherwise been sufficient. *See Simmons v. District of Columbia Armory Bd.*, 656 A.2d 1155, 1156 (D.C. 1995).

misconduct concerning her improper "AWOL status" around May 6 to May 17, 2013; incorrect documentation of her attendance between May 16 and June 21, 2013; and incorrect pay-step calculation from February 2009 until February 2013. *See* Second Amended Complaint. Even construing the allegations in the light most favorable to plaintiff, all of the alleged misconduct by defendant DCPS appears to have preceded July 1, 2013. The only event that arguably occurred after July 1, 2013, is plaintiff's receipt of her final paycheck on July 12, 2013, which plaintiff does not appear to challenge.[7] The Court concludes, therefore, that plaintiff's claims are barred by the statute of limitations.

Accordingly, it is this 3rd day of May, 2017, hereby

ORDERED that defendants' motion to dismiss plaintiff's Second Amended Complaint is GRANTED; and it is further

ORDERED that plaintiff's case is dismissed without prejudice; and it is further

ORDERED that the status hearing currently scheduled for June 2, 2017, is vacated.

SO ORDERED.

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

[7] Although the original complaint referred to August 10, 2013, as the date of plaintiff's termination by DCPS, the Second Amended Complaint does not mention that date, nor contain any claims related to the termination.

Copies to:

Janea J. Hawkins, Esq.

Andrea G. Comentale, Esq.

Lashcka Brown-Bassey, Esq.

Aprille Washington
3405 Texas Avenue, S.E.
Washington, D.C. 20020

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS

June 27, 2013

Aprille Washington
3405 Texas Ave, SE
Washington, DC 20020

Re: Notice of Minimally Effective IMPACT Rating and Termination

Employee ID: 50561

Dear Aprille Washington:

This letter serves as notice that you have received a final 2012-2013 rating of Minimally Effective under IMPACT, the District of Columbia Public Schools' Effectiveness Assessment System for School-Based Personnel. At the close of the 2011-2012 school year you also received an IMPACT rating of Minimally Effective. IMPACT procedure provides that employees who receive a rating of Minimally Effective for two consecutive years are subject to separation. As a result, your employment with the District of Columbia Public Schools will be terminated, effective August 10, 2013.

You may elect to contest this termination in one of the following ways, not both:

1. You may file an appeal with the D.C. Office of Employee Appeals (OEA). Your appeal must be filed within thirty (30) calendar days of the effective date of your termination. You must submit your appeal directly to OEA, 1100 4th Street, S.W. (East Building) Suite 620E, Washington, DC 20024; telephone (202) 727-0004. A copy of the OEA Rules and the appeal information are attached to this letter. In addition, this information is available at http://oea.dc.gov/service/file-employee-appeal.

   or

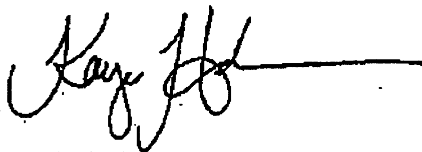
2. You may file a grievance pursuant to the Collective Bargaining Agreement between DCPS and the American Federation of State, County and Municipal Employees Local 2921. Your grievance must be submitted within ten (10) workdays of your receipt of this notice. You or your union representative must submit your grievance in writing to DCPS Labor Management and Employee Relations, 1200 First Street, N.E., 10th Floor, Washington, DC 20002; telephone (202) 442-5373.

In addition to either of these two options, you may file an Appeal to the Chancellor pursuant to 5-E DCMR 1306. Your appeal must be filed within thirty (30) days of your receipt of the contested evaluation, but no later than August 7, 2013. Appeals to the Chancellor must be filed with DCPS via the IMPACT system. You can access the IMPACT system at http://impactdcps.dc.gov. Your login information is your dc.gov email address and password.

Filing an appeal to the Chancellor does not modify, change, or affect the requirement that any appeal to OEA be filed within thirty (30) calendar days of the effective date of your termination, or the requirement to file a grievance ten (10) workdays of your receipt of this notice.

Your health benefits coverage will continue through August 10, 2013, followed by a 31-day temporary extension of coverage at no cost to you. If you are interested in continuing your health insurance and/or life insurance coverage beyond the 31-day extension, please read the enclosed document which provides additional information regarding Temporary Continuation of Coverage (TCC) insurance.

Sincerely,



Kaya Henderson
Chancellor

Enclosures: OEA Rules; Temporary Continuation of Coverage Guidelines

cc: Official Personnel File

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	OEA Matter No.: 1601-0158-13
Aprille Washington, Employee	Date of Issuance: March 3, 2015
v.	
D.C. Public Schools, Agency	Senior Administrative Judge Joseph E. Lim, Esq.

Sara White, Esq., Agency Representative
Aprille Washington, Employee *Pro Se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 9, 2013, Aprille Washington ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") final decision to remove her from her position as an Educational Aide at Turner Elementary School. Employee was removed based on her "Minimally Effective" ratings under Agency's IMPACT program, an effective assessment system for school-based personnel.[1] Employee's termination was effective on August 10, 2013.

This matter was assigned to me in May of 2014. On July 18, 2014, I held a prehearing conference for the purpose of assessing the parties' arguments. I then held an evidentiary hearing on October 6, 2014, where both parties presented evidence. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

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[1] IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2011-2013 school years to rate the performance of school-based personnel.

ISSUE

Whether Agency's removal of Employee should be upheld.

Agency's Position

Agency argues that Employee's termination under the IMPACT program was done in accordance with all District of Columbia statutes, regulations, and laws. Agency also argues that OEA's jurisdiction is limited with respect to the instant appeal and that Employee may only challenge whether the evaluation process and tools were properly administered. According to Agency, Employee was properly evaluated under the IMPACT program, which resulted in her receiving a final IMPACT score of "Minimally Effective" ratings during the 2011-2012 and 2012-2013 school years.

Employee's Position

Employee argues that her IMPACT scores were due to the retaliatory practices and harassment she suffered by the school principal. Employee asserts that the separation was improper due to the principal's failing to meet with her to discuss her performance in post-IMPACT meetings.

Summary of Evidence presented at the hearing

a. Kathryn McMahon-Klosterman ("Klosterman") testified as follows: (Transcript, Pgs. 7 – 53, 202 - 215)

As the Director of IMPACT operations, Klosterman described the IMPACT process of school employee performance evaluations to be occurring the entire school year's cycles. She testified that Employee received minimally effective IMPACT ratings for two consecutive school years in a row. As a result, in accordance with Agency policy, Employee was separated.[2] Among the reasons for Employee's subpar ratings are tardiness, unexcused absences, inconsistent support of the classroom teacher, lack of support for local school initiatives and deductions for insufficient core professionalism.

According to Klosterman, ratings are made by a school administrator, typically the school principal or his or her assistant. Klosterman testified that the documents indicated that both Principal Robert Gregory and Assistant Principal Coquette Petrella conducted Employee's assessments and held evaluations with Employee or attempted to hold post-assessment conferences. For an assessment to be valid without a conference, two attempts to contact employees for conferences are required. Employees can access and download their IMPACT reports from the school database at any time.

Klosterman clarified that educational aides and dedicated aides are grouped together for purposes of IMPACT and are evaluated on the same components. She also testified that school administrators can inform personnel of impending IMPACT conferences by phone, email, or in

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[2] See Agency Exhibits 1 to 7 for Employee's IMPACT reports.

person. Klosterman also pointed out that even if Employee did not have a negative 40 score because of her lack of core professionalism due to absences and tardiness, Employee would still be rated minimally effective at 236 points and thus terminated.

Klosterman explained that an employee who receives a minimally effective IMPACT score one school year and then progresses to developing the next school year will get another school year to improve to a 300 effective IMPACT score. However, an employee who receives a developing IMPACT score one school year and then declines to minimally effective the next school year will be terminated as that shows a deterioration in performance. With regards to tardiness or absences, the collective bargaining agreement between Agency and the union governs the time period and procedure for asking for leave. Depending on the school, notifying the school when an employee is going to be late or absent can be done by phone or email.

b. Robert Gregory ("Gregory") testified as follows: (Transcript, Pgs. 54 – 114)

Robert Gregory was a teacher for Agency for fifteen years. From 2007 to 2013, Gregory served as the Principal for Turner Elementary. During the 2011-2012 school year, he evaluated Employee's performance as a paraprofessional and held the post-assessment conferences with Employee. He explained the scores that he gave Employee. Gregory testified that an employee had a duty to notify the main office if they were either going to be absent or late, so that the school would have time to make accommodations to insure proper student-staff ratios. He pointed out the time sheets that indicated the instances that Employee was either tardy or absent.[3]

Gregory described his working relationship with Employee as good. Under cross-examination, he testified that based on the sign-in sheets, Employee was absent on June 6 and 7, 2013.[4] Some of the days that Employee was absent were excused while other days were unexcused when Employee failed to follow the protocol for requesting leave. Gregory recalled one instance when Employee refused to sign the standard form regarding her absences.

c. Malita Brittany Wright ("Wright") testified as follows: (Transcript, Pgs. 117 – 140)

Wright, a former paraprofessional at Turner Elementary School, testified that Employee was a dedicated aide. She differentiated a dedicated aide from a paraprofessional by stating that a dedicated aide is assigned to one student the entire work day while a paraprofessional is an assistant to the class teacher. The training is different. A dedicated aide is needed if the student has shown himself or herself to be a danger to others. For example, if a kindergardener has stabbed a classmate with a pencil.

Ms. Wright saw Employee outside of school on April 26, 2013, and walked her inside. She testified that the sign in sheet was not always available and that she would not find out if she was marked absent without leave ("AWOL") until she saw her paystub.

Ms. Wright admitted that she was also terminated after receiving minimally effective IMPACT scores from Principal Gregory and Assistant Principal Petrella. Wright, Employee, and

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[3] Agency Exhibit 10.
[4] Agency Exhibit 11.

two others filed a complaint because they did not receive their end of the school year conference and because management kept putting them in places such as the cafeteria where paraprofessionals should not be in. She also testified that Employee was present on June 12, 2013 but absent from May 6 to May 15, 2013.

d. West Bundu-Conteh ("Conteh") testified as follows: (Transcript, Pgs. 140 - 149)

Conteh, a former paraprofessional at Turner Elementary School until June 1, 2012, testified that during the relevant time period, the sign in sheet was not always available.

e. Geraldine Washington ("Washington") testified as follows: (Transcript, Pgs. 149 - 161)

Washington, Employee's sister, testified that she notified Agency beforehand whenever Employee was sick on May 6, 2013, via phone and email. She accompanied Employee when they took a taxi to drop Employee's child off at school before work. On June 6 or 7, 2013, School Principal Petrella left a message on Employee's phone.

When confronted with copies of her emails, Washington admitted that she usually called one or two hours beyond Employee's start of duty.[5] She said that Employee was too ill to call the school herself.

f. Jacquelyn Pinckney-Hackett testified as follows: (Transcript, Pgs. 162 - 165)

Ms. Hackett, another sister of Employee, testified that Employee was indeed ill starting May 6, 2013, as she was the one who took Employee to the doctors. She also called the doctor on June 7, 2013, when Employee experienced severe pain.

g. Employee testified as follows: (Transcript, Pgs. 170 - 202)

Employee testified that although she was assigned as a kindergarten educational aide, she was used as a pre-K aide, as well as a dedicated aide. She complained that she was listed as AWOL even when she came back with five doctors' notes, and that her sister notified then-Principal Gregory whenever she was ill. Employee complained that she was placed on annual leave from May 16, 2013 through June 21, 2013, even though she was present. She stated that the only day she was absent was June 7, 2013. She complained about Ms. Petrella emailing her about the post-IMPACT evaluation conference by email instead of notifying her directly. Employee recalled that on June 7, 2013, when Ms. Petrella called her, she was home in pain.

On April 26, 2013, Employee testified that she suffered from vertigo when she arrived at work. Employee opined that her poor IMPACT score stemmed from management's unfairly listing her as AWOL when she was out sick, making her work as a dedicated aide when she wasn't trained for it, and that she was a victim of retaliation after filing a harassment complaint

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[5] *See* Employee Exhibits 1 to 4. In addition, these emails pertain to dates when Agency did not charge Employee as absent without leave. Thus, they are irrelevant to her IMPACT rating.

with the D.C. Council and DCPS Chancellor Head Kaya Henderson about being saddled with too many children from kindergarten and first grade without supervision.

Employee admitted she was tardy every school day from January 2012 to June 2012 because the Randall Highlands Elementary school principal barred her sister from school. She explained that her son is a special needs child and needs either her sister or herself to settle the child in school. Employee declared that Principal Gregory and the Randall Highlands Elementary school principal conspired to bar her sister from the Randall Highlands School.

Employee testified that she was present on June 12, 2013, but absent on June 17, 2013, getting a bone scan. She denied that Principal Gregory had a conference with her on June 15, 2013, as she was out on sick leave. On June 13, 2013, she returned to work but had to go home after feeling ill. Her doctor then placed her on leave for the rest of the school year.

Employee reasoned that she could not be possibly minimally effective if Agency kept assigning her as a dedicated aide to kindergarten, pre-K3, and pre-K4 kids in a single school year. Employee insisted that she always followed protocol each time she was either late or absent, and that she verbally asked Principal Gregory for accommodation when she had to drop her son off at school.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

D.C. Official Code § 1-617.18 grants DCPS the authority to create and implement its own tools for evaluating employees. IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during the 2011-2013 school year.[6] According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2012-2013 school year, Agency utilized IMPACT as its evaluation system for all school-based employees. The IMPACT system was designed to provide specific feedback to employees to identify areas of strength, as well as areas in which improvement was needed.[7]

In *Brown v. Watts*[8], the Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court stated that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure."[9] Based on the holding in *Watts*, I find that this Office may only interpret the relevant provisions of the CBA between WTU and DCPS as they relate to the adverse action in question in this matter.

Section 15.4 of the CBA between WTU and Agency provides in pertinent part as follows:

[6] Agency Exhibit 9.
[7] *Id.*
[8] 933 A.2d 529 (April 15, 2010).
[9] Pursuant to D.C. Code § 1-616.52(d), "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization *shall take precedence* over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization" (emphasis added).

> 15.4: The standard for separation under the evaluation process shall be "just cause", which shall be defined as *adherence to the evaluation process only*. (Emphasis added).

Accordingly, I am primarily guided by §15.4 of the CBA between WTU and DCPS in reviewing this matter, and I will only address whether or not Agency's termination of Employee pursuant to his/her performance evaluation was supported by just cause. As referenced above, 'just cause' is defined as adherence to the *evaluation process only* (emphasis added). Thus, OEA's jurisdiction over this matter is limited only to Agency's adherence to the IMPACT process it instituted at the beginning of the school year.

The IMPACT process required that all staff receive written feedback regarding their evaluation, in addition to a post-evaluation conference with their evaluators. IMPACT evaluations and ratings for each assessment cycle were available online for employees to review by 12:01 a.m., the day after the end of each cycle. If an employee had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS' IMPACT team by telephone or email. At the close of the school year, all employees received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees' home address on file.

It is undisputed that prior to instituting the IMPACT program, all principals and assistant principals at DCPS were provided with training materials, which they then used to conduct a full-day training with all staff members in September of 2009. The training included providing information pertinent to the IMPACT process, in addition to the positive and negative impacts associated with the final IMPACT rating. Each staff member was provided with a full IMPACT guidebook that was unique to their evaluation group. The guidebooks were delivered to the employees' schools and were also available online via the DCPS website. Throughout the year, the IMPACT team visited schools to answer questions, as well as to ensure that the IMPACT hotline was available to all staff members via email and/or telephone to answer questions and provide clarification.

During the 2011-2013 school year, there were twenty-five (25) IMPACT grouping of DCPS employees.[10] Employee's position – Educational Aide, was within Group 17. The IMPACT process for Group 17 employees consisted of two (2) assessment cycles: the first assessment cycle ("Cycle 1"), which was between September 21st and December 1st; and the third assessment cycle ("Cycle 3") which had to occur by June 10. Group 17 employees were assessed on a total of five (5) IMPACT components, namely:

1) Educational Aide Standards—a measure of an Educational Aide's instructional support, school-wide support, positive rapport with students and families, and adaptability. This component accounted for 90% of an Educational Aide's IMPACT Score.

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[10] Agency's Answer, p. 2.

2) Commitment to the School Community—a measure of the extent to which school-based personnel support their school's local initiatives, support the Special Education and English Language Learner Programs at their schools and make efforts to promote high academic and behavioral expectations. This component accounted for 10% of the IMPACT score.

3) Core Professionalism—a measure of four (4) basic professional requirements for all school-based personnel. These requirements are as follows: attendance; on-time arrival; compliance with policies and procedures; and respect. This component was scored differently from the others, as an employee could have additional points subtracted from their score if the rating was "slightly below standard" or "significantly below standard."

School-based personnel assessed through IMPACT, ultimately received a final IMPACT score at the end of the school year of either:[11]

1) Ineffective = 100-199 points (immediate separation from school);
2) Minimally Effective = 200-249 points (given access to additional professional development. If, after two years of support, however, an educator is unable to move beyond the Minimally Effective level, she or he will be subject to separation);
3) Developing = 250-299 points (given access to additional professional development. If, after three years of support, however, an educator is unable to move beyond the Developing level, she or he will be subject to separation);
4) Effective = 300-349 points; and
5) Highly Effective = 350-400 points.

DCMR §§1306.4, 1306.5 gives the superintendent of DCPS the authority to set procedures for evaluating Agency's employees.[12] The above-referenced DCMR sections provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. In the instant matter, the IMPACT process detailed above is the evaluation procedure put in place by Agency for the 2011-2013 school years.

In this case, Employee was evaluated by the school administrator ("evaluator") such as the school principal or the assistant school principal. Employee received a final evaluation on the above specified components at the end of each school year, wherein, she received a "Minimally Effective" IMPACT rating of 239 for School Year 2011-2012[13] and 216 for School Year 2012-2013. According to the documents submitted, the conferences occurred on December 1, 2011, and June 14, 2012, for School Year 2011-2012[14] and on December 18, 2012, for School Year

[11] Agency Exhibit 9, Group 17 IMPACT Pamphlet.
[12] DCMR § 1306 provides in pertinent parts as follows:
1306.4 – Employees in grades ET 6-15 shall be evaluated each semester by the appropriate supervisor and rated annually, prior to the end of the school year, under procedures established by the Superintendent.
1306.5 – The Superintendent shall develop procedures for the evaluation of employees in the B schedule, EG schedule, and ET 2 through 5, except as provided in § 1306.3
[13] Agency Exhibit 3.
[14] Agency Exhibit 1 and 2

2012-2013.[15] The testimony and the documents also show that two attempts at obtaining a conference with Employee were made on June 6, 2013, via email and June 7, 2013, via phone. Employee does not deny that she received a copy of her scores nor does she deny having conferences regarding her scores or that attempts were made to contact her for scheduling the last conference. Instead, Employee gripes about the fact that the 2013 attempts were made via email and phone. She also complains that when Assistant Principal Petrella called her by phone, she was ill. However, Employee does not and cannot show that these methods of scheduling a conference were proscribed by statute, regulation, or even by her union's CBA. Neither did Employee explain her failure to respond to the email and phone message. Thus, I find that Agency did follow the IMPACT process in terminating Employee.

Assuming *arguendo* that this Office's jurisdiction in this matter extends to the content or judgment of the evaluation, I find that, while Employee maintains that her scores were supposedly unfair, she did not specifically note in her submissions to this Office that the evaluator's comments were untrue; nor did she proffer any evidence that directly contradicted the evaluator's factual findings. It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*[16] explained that substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The court held that "it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [evaluator's] evaluation but that would support a better overall evaluation."[17] The court further stated that if the factual basis of the "principal's evaluation were true, the evaluation was supported by substantial evidence." In addition, the Court in *Shaibu* held that "principals enjoy near total discretion in ranking their teachers"[18] when implementing performance evaluations. The court concluded that since the "factual statements were far more specific than [the employee's] characterization suggests, and none of the evidence proffered to OEA by [the employee] directly controverted [the principal's] specific factual bases for his evaluation of [the employee]…" the employee's petition was denied.

Agency deducted forty points in Employee's core professionalism scores for unexcused absences on June 11 to 12, 2012, November 23, 2012, November 26, 2012, May 6, 2013, and June 7, 2013.[19] Employee's sisters claimed that they notified Agency about the absences on May 6, 2013, and June 7, 2013. However, contrary to office policy that notification about absences must be made prior to the start of the school day in order for school officials to have time in making other accommodations to ensure proper staffing levels, Employee's sister admitted that the calls were made one or two hours after school has started. Employee also failed to produce any evidence to show that she provided medical documents to school officials on the days that she was ill. Employee does not deny that instead of notifying school officials that she was going to be absent, she relied on her sisters who may not be familiar with the correct procedure for obtaining leave. Based on the evidence presented, these absences were not unexpected events which would have excused the late notification. Rather, these absences were part of several days

[15] Agency Exhibit 5.
[16] Case No. 2012 CA 003606 P (January 29, 2013).
[17] *Id.* at 6.
[18] *Id. Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).
[19] Although Employee submitted emails to show that her sisters notified school officials about her absences, I find these to be irrelevant as none of them related to the dates that she was charged absent without leave. *See* Employee Exhibits 1 to 4.

of absences, most of which were excused by Agency. The evidence showed that Employee did not notify her school officials ahead of time or make some type of arrangement with them regarding her schedule. Thus, the evidence showed that Employee or her agents failed to follow the proscribed policies and procedures of obtaining leave.

Agency also deducted core professionalism points for Employee's unexcused tardiness on June 11 to 12, 2012, November 2, 2012, November 27, 2012, April 19, 2013, and April 26, 2013. Employee admitted her tardiness but explained them away as due to an alleged conspiracy between the school principals of two different schools against one of her sisters, and her need to drop off her son at school at a later time.

Based on the evidence presented, Employee failed to present any credible evidence to substantiate her suspicions that the school principals of two different schools conspired to make her late for work. I also note that Employee's tardiness were not unexpected events which would have excused the late notification. Rather, these instances of tardiness were anticipated as Employee was well aware that she had to drop off her child at a time which would lead to her being late. The evidence showed that Employee never tried to notify her school officials ahead of time or make some type of arrangement with them that would have excused her frequent absences. I also note that although Agency deducted points based on six days of tardiness, Employee admitted that she was late to work every day from January to June 2012.[20]

Based on their courtroom demeanor and testimony, I find that Agency's witnesses to be more credible than Employee or her witnesses. Employee has not proffered to this Office any credible evidence that controverts any of the evaluator's comments. This Office has consistently held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[21] As performance evaluations are "subjective and individualized in nature,"[22] this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[23] Thus, I find that it was within the evaluator's discretion to rank and rate Employee's performance. Moreover, the undersigned Administrative Judge is not in the position to recommend that Employee receives a higher rating since the undersigned is unfamiliar with the nature and details of Employee's job. I would also note that even if no points were deducted for core professionalism, Employee would still have been separated for obtaining IMPACT scores of 259 for school year 2011-2012, and 256 for school year 2012-2013. Two

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[20] Transcript, Pg. 175.

[21] *See Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); *see also Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[22] *See also American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

[23] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

consecutive years of being rated "developing" would still have resulted in Employee's removal.[24]

I find that Employee's final argument that because she has worked for Agency for many years before she received any bad IMPACT ratings is not a legal ground for overturning Agency's action.

In the instant matter, I find that Employee was evaluated a total of four (4) times by the school administrator, in accordance with the IMPACT rules. I also find that Agency tried to contact Employee twice in order to schedule her final IMPACT conference. Employee received a copy of her IMPACT score, in addition to having post-evaluation meetings with her evaluator(s). Because Employee's final IMPACT score resulted in two consecutive years of a "Minimally Effective" rating, Employee was terminated from her position. Based on the foregoing, I find that Agency properly adhered to the IMPACT process and had cause to terminate Employee. Accordingly, Agency's action must be upheld.

ORDER

It is hereby ORDERED that Agency's action of terminating Employee is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

[24] *See* Agency Exhibit 9.

NOTICE OF APPEAL RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the Office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All petitions for review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation or policy;

3. The findings of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with the General Counsel's office, D.C. Office of Employee Appeals, 1100 4th St., SW (East Building), Suite 620E, Washington, DC 20024. Three (3) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review must file their response not later than thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail this day to:

Aprille Washington
3405 Texas Avenue, SE
Washington, DC 20020

Sara White, Esq.
Assistant Attorney General
DC Public Schools
Office of the General Counsel
1200 First Street, NE 10th Floor
Washington, DC 20002

Katrina Hill
Clerk

March 3, 2015
Date

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2017 CA 003829 P(MPA) WASHINGTON, APRILLE Vs. OFFICE OF EMPLOYEE APPEALS NEK

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Docket Entry Scheduling Conference Hearing >

1 Add Record
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8 Docket ID Display
9 Condition
10 AR Assignment

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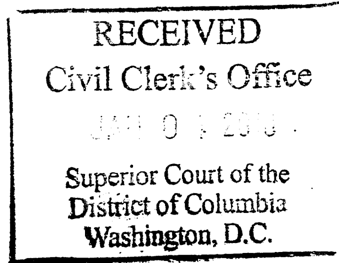
Description

Scheduling Conference Hearing
Event: Scheduling Conference Hearing
Date: 12/01/2017 Time: 9:00 am
Judge: KRAVITZ, NEAL E Location: Courtroom 100

Entered By: BUSTOSJ Updated By: BUSTOSJ Updated Date: 09/01/2017 09:35

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS



REPLY TO:
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Washington, DC 20024
(202)727-0004
FAX (202)727-5631

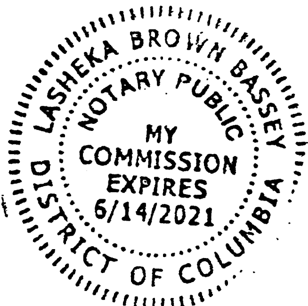
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Aprille Washington,	)
	) Case No. 2017 CA 003829 P(MPA)
Petitioner	)
	) Judge Neal E. Kravitz
v.	)
Office of Employee Appeals, Respondent.	)

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Aprille Washington v. District of Columbia Public Schools,* OEA Matter No. 1601-0158-13. The record consists of one volume containing eleven (11) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist



District of Columbia: SS
Subscribed and Sworn to before me
this 4th day of January, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

FILED
CIVIL ACTIONS BRANCH
JUL 10 2017
Superior Court
of the District of Columbia
Washington, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

FRANCINE THOMAS
Petitioner(s)

17-0004678

v.

MPA NO. ______

Metropolitan Police Dept + DC Office of Employee Appeal
Respondent(s)

RECEIVED
2017 DEC 13 PM 2:53
OFFICE OF EMPLOYEE APPEALS

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that Francine Thomas appeals to the Superior Court of the District of Columbia from the order of DC Office of Employee Appeals (agency or official's name), issued on the 6 day of June, 2017. A copy of that order or decision is attached to this petition.

Description of Judgment or Order: Opinion & Order on Petition for Review OEA# 2401-0025-12

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: Revised decision on factual documentation govern by the DPM

B. Address of Respondent, Agency or Official: Metropolitan Police Dept 300 Indiana Ave N.W DC 20001

C. Names and addresses of all other parties to the Agency's proceeding: ______

D. Names and address of parties or attorneys to be served:

	NAME	ADDRESS
1.	Frank McDonald, Esq.	441 4th St. NW Suite 1180N DC 20001
2.		
3.		
4.		

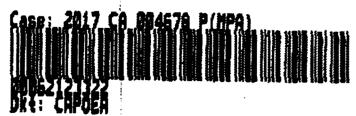
E. A copy of the Agency's decision or Order sought to be reviewed is attached.

FRANCINE THOMAS
Print name of petitioner's attorney

[signature]
Signature of petitioner's counsel or petitioner's signature

Address: 923 6th St S.W Washington, DC 20024

Bar No. ______ Telephone No (202) 997-3586



Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
FRANCINE THOMAS,	)	
Employee	)	
	)	OEA Matter No.: 2401-0025-12
v.	)	
	)	Date of Issuance: June 6, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Francine Thomas ("Employee") worked as an Information Technology Customer Support Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was October 14, 2011.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 10, 2011. In her appeal, Employee argued that Agency violated several D.C. Municipal Regulations ("DCMR") when it conducted the RIF. Specifically, she stated that Agency failed to properly define the RIF competitive levels and the retention standing of affected employees. Employee also contended that Agency was required to engage in Impact and

Implementation bargaining prior to the RIF under the terms of the Collective Bargaining Agreement between Agency and her union.[1]

Agency filed its Answer to the Petition for Appeal on December 13, 2011. It denied the allegations against it and requested that an oral hearing be held in the matter. An OEA Administrative Judge ("AJ") was assigned to the case on August 2, 2013. On October 3, 2013, the AJ held a prehearing conference to assess the parties' arguments. Both Employee and Agency were ordered to submit legal briefs addressing whether Agency's RIF action should be upheld.[2] The AJ subsequently ordered the parties to submit a second round of briefs addressing whether this Office can exercise jurisdiction over the instant appeal because Agency asserted that Employee elected to voluntarily retire after the effective date of the RIF action.[3] After receiving the briefs and holding several status conferences, the AJ determined that an evidentiary hearing was warranted. Therefore, a hearing was held on July 7, 2015, wherein the parties presented testimonial and documentary evidence in support of their respective positions.[4]

The AJ issued his Initial Decision on December 30, 2015. He first highlighted the holdings in *Covington v. Department of Health & Human Services*, 750 F.2d 937, 941 (Fed.Cir.1984) and *Christie v. United States*, 207 Ct.Cl. 333, 518 F.2d 584, 587 (1975), wherein the United States Court of Appeals, Federal Circuit, held that employees have the burden of proof in showing that their decision to retire was involuntary because a retirement request that is initiated by an employee is presumed to be voluntary. Next, the AJ highlighted *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155 (D.C. 2005), in which the D.C. Court of Appeals addressed whether a retirement could be deemed involuntary if the employing

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[1] *Petition for Appeal*, Attachment 1 (November 10, 2011).
[2] *Order Requesting Briefs* (February 2, 2015).
[3] *Order on Jurisdiction* (July 8, 2015)
[4] *Order Scheduling Hearing* (September 2, 2015).

agency did not make it affirmatively clear to the employee that he would lose the right to appeal the RIF action if he submitted a retirement application.

In applying the standard of review provided in *Covington, Christie, and Bagenstose*, the AJ held that Employee failed to meet her burden of proof in establishing that her retirement was involuntary. The AJ explained that there was no credible documentary or testimonial evidence in the record to prove that Agency misinformed Employee about her retirement options. In addition, he stated that Employee submitted a retirement application with an effective date of October 14, 2011, the same date as the effective date of the RIF. According to the AJ, Employee could have sought legal advice about the consequences that submitting a retirement application would have on her appeal before OEA. Lastly, he noted that Employee's Notification of Personnel Action Form 50 ("Form 50") stated in the "Nature of the Action" section that the retirement was a "Retirement—Retire w/ Pay." As a result, he held that Employee's retirement was voluntary and that OEA lacked jurisdiction over her appeal. Therefore, Employee's Petition for Appeal was dismissed for lack of jurisdiction.[5]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 3, 2016. She contends that the AJ utilized the incorrect standard of review when he determined that Employee's retirement was involuntary. Employee also asserts that the case precedent relied upon by the AJ is not analogous of the facts in the instant case. In addition, she states that the AJ's findings are not based on substantial evidence. Accordingly, Employee requests that her Petition for Review be granted.[6]

Agency filed its Opposition to Employee's Petition for Review on March 9, 2016. It provides that the case law relied upon by the AJ in his Initial Decision was correctly applied to

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[5] *Initial Decision* (December 30, 2015).
[6] *Petition for Review* (February 3, 2016).

the facts in this case. It further opines that the Initial Decision was based on substantial evidence. Therefore, Agency argues that Employee's Petition for Review should be denied and that the Initial Decision should be upheld.[7]

Involuntary Retirement

Employee argues that the AJ erred in dismissing her Petition for Appeal for lack of jurisdiction. Thus, the essential question that must be answered in this case is whether her retirement was voluntary or involuntary. This will determine if OEA has jurisdiction to consider Employee's substantive arguments. According to *Jenson v. Merit Systems Protection Board*, 47 F.3d 1183 (Fed. Cir. 1995), an employee's decision to retire is deemed voluntary unless the employee presents sufficient evidence to establish otherwise. For a retirement to be considered involuntary, an employee must establish that their retirement was due to the agency's coercion or misinformation upon which the employee relied. OEA has consistently held that the burden rests on employees to show that their retirement was involuntary.[8] Such a showing would constitute a constructive removal and allow OEA to adjudicate Employee's substantive arguments.

According to Employee, the AJ should have applied the standard of review as provided in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008), instead of *Bagenstose,* to determine whether her decision to retire was voluntary or involuntary. In *Stanley*, the D.C. Court of Appeals held that "the fact that an employee is faced with an

[7] *Opposition to Petition for Review* (March 9, 2016).
[8] *Esther Dickerson v. Department of Mental Health*, OEA Matter No. 2401-0039-03, *Opinion and Order on Petition for Review* (May 17, 2006); *Georgia Mae Green v. District of Columbia Department of Corrections*, OEA Matter No. 2401-0079-02, *Opinion and Order on Petition for Review* (March 15, 2006); *Veda Giles v. Department of Employment Services*, OEA Matter No. 2401-0022-05, *Opinion and Order on Petition for Review* (July 24, 2008); *Larry Battle, et al. v. D.C. Department of Mental Health*, OEA Matter Nos. 2401-0076-03, 2401-0067-03, 2401-0077-03, 2401-0068-03, 2401-0073-03, *Opinion and Orders on Petition for Review* (May 23, 2008); and *Michael Brown, et al. v. D.C. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09, 1601-0013-09, 1601-0014-09, 1601-0015-09, 1601-0016-09, 1601-0017-09, 1601-0018-09, 1601-0019-019, 1601-0020-09, 1601-0021-09, 1601-0022-09, 1601-0023-09, 1601-0024-09, 1601-0025-09, 1601-0026-09, 1601-0027-09, 1601-0052-09, 1601-0053-09, and 1601-0054-09, *Opinion and Orders on Petition for Review* (January 26, 2011).

inherently unpleasant situation or that his choice is limited to two unpleasant alternatives is not enough by itself to render the employee's choice involuntary." It provided that the test to determine voluntariness is an objective one that, considering all the circumstances, the employee was prevented from exercising a reasonably free and informed choice. In addition, the Court in *Stanley* noted that as a general principle, an employee's decision to resign is considered voluntary "if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. With meaningful freedom of choice as the touchstone, courts have recognized that an employee's resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information."[9]

This Board finds that Employee's argument regarding the involuntariness of her retirement fails under the standard of review provided in *Stanley*. In *Stanley*, two police commanders were informed that their employment would be terminated immediately unless they retired that very day. A third commander was given the same choice, unless he agreed to a demotion. All three employees in *Stanley* chose to retire under protest after being given only hours to make a decision.[10] In this case, Employee was not subject to coercion and duress by Agency. Moreover, there is no credible evidence in the record to support a finding that she was presented with a "quit or be fired" ultimatum. Therefore, we are unpersuaded by Employee's argument.

After adducing the testimony from witnesses during the evidentiary hearing before OEA, the AJ held that Employee was not mislead by Agency about the retirement process. He found the testimony of Agency's witness, Human Resource Specialist, Shawn Winslow, to be

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[9] *Id.*
[10] *Stanley*, 942 A.2d at 1776

forthright and more credible than Employee's testimony. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[11]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[12] Based on the foregoing, there is substantial evidence in the record to support the AJ's decision that Employee retired voluntarily. Furthermore, the AJ correctly held that OEA lacks jurisdiction over voluntary retirements. Accordingly, Employee's Petition for Review must be denied.

---

[11] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[12] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams.

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

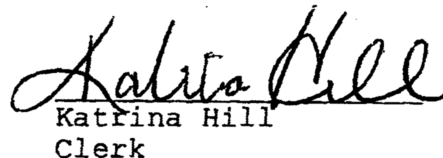
CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Francine Thomas
923 6th Street, SW
Washington, DC 20024

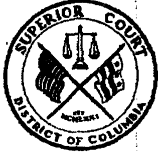
Robert J. Shore
Asst. General Counsel NAGE
901 North Pitt Street, Suite 100
Alexandria, VA 22314

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001



Katrina Hill
Clerk

June 6, 2017
Date



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FRANCINE THOMAS
Vs. C.A. No. 2017 CA 004678 P(MPA)
METROPOLITAN POLICE DEPARTMENT et al

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("SCR Civ") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the Summons, the Complaint, and this Initial Order. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in SCR Civ 4(m).

(3) Within 20 days of service as described above, except as otherwise noted in SCR Civ 12, each defendant must respond to the Complaint by filing an Answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in SCR Civ 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an Initial Scheduling and Settlement Conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than six business days before the scheduling conference date. No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each Judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge JENNIFER A DI TORO
Date: July 10, 2017
Initial Conference: 9:30 am, Friday, October 13, 2017
Location: Courtroom 518
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

Caio.doc

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Clerk's Office. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

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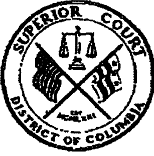

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THOMAS, FRANCINE
Plaintiff(s)

v.

Case No: 2017 CA 004678 P(MPA

METROPOLITAN POLICE DEPAI
Defendant(s)

FINAL NOTICE

RECEIVED
2017 DEC 13 PM 2:49
OFFICE OF EMPLOYEE APPEALS

To (insert name and address of the party to be served):
DC OFFICE OF EMPLOYEE APPEA
955 L'Enfant Plaza SW
Washington, D.C. 20024

The enclosed summons, complaint and initial order are served pursuant to Rule 4(c)(4) of the Superior Court Rules of Civil Procedure.

Our records indicate that on 11/17/17 (insert date), a Notice and Acknowledgment of Receipt of Summons, Complaint, and Initial Order ("Notice and Acknowledgment") was sent to you at this address. Pursuant to Rule 4(c)(4), a person who receives a Notice and Acknowledgement has 20 days to return it, thereby acknowledging and accepting service. You are being sent this Final Notice because 20 days have elapsed since the initial Notice and Acknowledgment was mailed, and the sender has not yet received a signed copy in the mail.

You must sign and date the Acknowledgement (below). If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate next to your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate next to your signature your authority.

If you do not complete and return this form to the sender within 5 days, you (or the other party on whose behalf you are being served) will be required to pay the costs of service by alternative method unless good cause is shown. "Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property. While the cost of private service or process varies, it can often cost upwards of $250 to serve an individual. Service could be by U.S. Marshal, special process server or any other manner the court deems appropriate.

If you do complete and return this form, you (or the other party on whose behalf you are being served) must answer the complaint within twenty (20) days after you have signed, dated and returned the form. If you fail to do so, judgment by default may be entered against you for the relief demanded in the complaint.

This Final Notice and Acknowledgment of Receipt of Summons, Complaint and Initial Order was mailed on (insert date): 12/8/2017.

Signature

12-8-17
Date of Signature

Para pedir una traducción, llame al (202) 879-4828
Để có một bài dịch, hãy gọi (202) 879-4828
如需翻译,请打电话 (202) 879-4828
□□□□□ □□□□ □□□□□ (202) 879-4828 □□□□
Veuillez appeler au (202) 879-4828 pour une traduction
번역을 원하시면, (202) 879-4828 로 전화주십시요

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS, COMPLAINT, AND INITIAL ORDER

I (print name) Lasheka Brown Bassey received a copy of the summons, complaint and initial order in the above captioned matter at (insert address): 955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Lasheka B. Bassey
Signature

OEA General Counsel
Relationship to Defendant/Authority to Receive Service

Dec. 13, 2017
Date of Signature

Para pedir una traducción, llame al (202) 879-4828
Để có một bài dịch, hãy gọi (202) 879-4828
如需翻译,请打电话 (202) 879-4828
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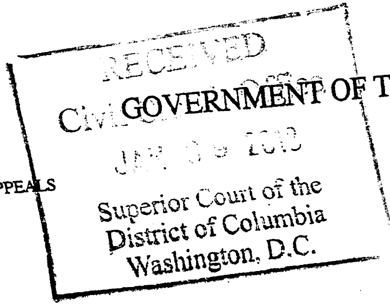
Veuillez appeler au (202) 879-4828 pour une traduction
번역을 원하시면, (202) 879-4828 로 전화주십시요



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

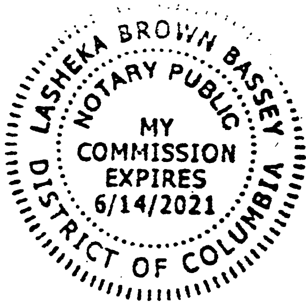
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FRANCINE THOMAS, Petitioner v. METROPOLITAN POLICE DEPARTMENT et al., Respondent.	Case No. 2017 CA 004678 P(MPA) Judge Jennifer A. DiToro

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Francine Thomas v. Metropolitan Police Department,* OEA Matter No. 2401-0025-12. The record consists of two volumes containing fifty-nine (59) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist



District of Columbia: SS
Subscribed and Sworn to before me
this 9th day of January, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

Filed
D.C. Superior Court
11/21/2017 13:45PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

In the matter of:	)
	)
WIDMON BUTLER,	)
1717 R Street NW, Apt. 202	)
Washington, DC 20009	)
	)
Petitioner,	)
	)
v.	)
	)
METROPOLITAN POLICE DEPARTMENT,	)
300 Indiana Avenue, NW, Room 4125	)
Washington, DC 20001	)
	)
and	)
	)
D.C. OFFICE OF EMPLOYEE APPEALS	)
955 L'Enfant Plaza, SW, Suite 2500	)
Washington, DC 20024	)
	)
Respondents.	)
	)

PETITION FOR REVIEW OF AGENCY DECISION

Notice is hereby given that Petitioner Widmon Butler, by and through counsel, appeals to the Superior Court of the District of Columbia from the District of Columbia Office of Employee Appeals ("OEA") Board Order issued on the 7th day of November, 2017. A copy of the Order sought to be reviewed is attached to this petition as Exhibit 1.

Petitioner worked as a Claims Examiner with the District of Columbia Metropolitan Police Department (the "Agency"), and the Agency issued a Notice of Final Decision ("Notice") on February 5, 2015, terminating Petitioner effective February 6, 2017. The Notice charged Mr. Butler with interfering with the efficiency or integrity of government operations and engaging in outside employment that conflicts with the impartial performance of his duties. Ex. 1 at 2. Mr.

Butler appealed the Notice to the OEA on March 6, 2015, and the OEA issued a Remand Order to the Agency on October 18, 2016, concluding that the Agency failed to provide any evidence to justify the termination penalty, including three offenses of misfeasance. *Id.* at 2-3. Post hoc, the Agency provided a third allegation of misfeasance and the OEA issued an Initial Decision on November 30, 2016 upholding the termination decision. *Id.* at 2-6. The Petitioner submitted a Petition for Review to the OEA Board, and the Board incorrectly found that the Initial Decision was based on substantial evidence in the record. Further, the OEA misinterpreted the ninety-day deadline to bring an adverse action against a police officer. *See id.* at 10-11. Petitioner hereby files this Petition for Review of the OEA's final November 7, 2017 decision, upholding the Agency's decisions to terminate Petitioner.

<u>Address of Respondent Agency or Official</u>:

D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

<u>Names and Addresses of all other parties to the Agency proceeding:</u>

Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

<u>Names and addresses of parties or attorneys to be served:</u>

Karl A. Racine
Office of the Attorney General
441 4th Street, NW, Suite 1100S
Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
1100 4th St SW, Suite 620 East
Washington, DC 20024-4451
Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Respectfully submitted,

/s/ David A. Branch

David A. Branch
Law Office of David A. Branch and
Associates, PLLC
1828 L Street, NW, Suite 820
Washington, D.C. 20036
(202) 785.2805 phone
(202) 785.0289 fax
davidbranch@dbranchlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2017 a copy of the foregoing was served on the following by first-class mail:

Karl A. Racine
Office of the Attorney General
441 4th Street, NW, Suite 1100S
Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Respectfully submitted,

/s/ David A. Branch
David A. Branch

Exhibit 1

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WIDMON BUTLER,	)	
Employee	)	
	)	OEA Matter No.: 1601-0049-15
v.	)	
	)	
	)	Date of Issuance: November 7, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Civilian Claim Specialist with the Metropolitan Police Department's ("Agency") Medical Services Branch ("MSB"). On July 22, 2013, while on duty, Employee accessed the medical records of Josephine Jackson, a civilian Agency employee, without authorization. Employee subsequently contacted the Director of the Office of Risk Management, stating that he was Ms. Jackson's attorney and that he was retained to ascertain the status of her workers' compensation claim.[1] Agency's Director of Human Resources was subsequently apprised of Employee's actions and forwarded the information to

[1] Employee admitted that he represented Ms. Jackson in a pro bono capacity in her workers' compensation claim against the Office of Risk Management and that he had written authorization to access Ms. Jackson's medical records. Employee further conceded that he understood and signed the Police & Fire Clinic's Acceptable Use Agreement related to his employment with Agency.

the Internal Affairs Department ("IAD") for investigation. Employee was placed on administrative leave with pay while IAD and the United States Attorney's Office ("USAO") conducted a review of the matter. On June 2, 2014, the USAO declined to prosecute Employee. On September 25, 2014, the IAD submitted its final investigative report to the Assistant Chief of Police.

As a result, Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations: misfeasance; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources; using or authorizing the use of government resources for other than official business." Employee was also charged with violating Chapter 18, Section 1800.3 of the D.C. Personnel Regulations ("DCPR"), which prohibits District employees from engaging in outside employment or private business that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.[2] A Hearing Officer appointed to conduct an administrative review of the charges against Employee recommended that he be terminated. On February 5, 2015, Agency issued its Notice of Final Decision. Employee's termination was effective on February 6, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 6, 2015. In his appeal, Employee denied the charges against him and stated that his actions forming the basis of his termination were substantially performed while off-duty. Employee also asserted that he was innocent of each charge and specification and requested that he be reinstated with back pay and benefits.[3]

---

[2] *Agency's Answer to Petition for Appeal*, Tab 2 (April 9, 2015). The charges levied against Employee included: Charge No. 1, Specifications Nos. 1, 2, and 3; and Charge No. 2, Specification No.1.
[3] *Petition for Appeal* (March 6, 2015).

Agency filed its Answer to the Petition for Appeal on April 9, 2015. It denied Employee's substantive claims and requested that an evidentiary hearing be held.[4] An OEA Administrative Judge ("AJ") was assigned to the matter on May 27, 2015. On September 11, 2015, the AJ issued a Third Order Convening a Prehearing Conference to assess the parties' arguments. After determining that there were material issues of fact in dispute, the AJ held a hearing, wherein the parties presented testimonial and documentary evidence in support of their positions.

After reviewing the hearing transcript,. the AJ issued a Remand Order to Agency on October 18, 2016. According to the AJ, Agency failed to present any evidence during the hearing to justify imposing a penalty beyond what was allowable under the Table of Appropriate Penalties ("TAP") in Chapter 16 of the District Personnel Manual ("DPM"). Specifically, he stated that to support termination under the TAP, Agency was required to prove that Employee committed three offenses of misfeasance. Since the AJ believed that Agency only presented two instances wherein Employee was disciplined for misfeasance, the matter was remanded to determine the proper penalty to impose against Employee in accordance with the TAP.[5]

In response to the AJ's order, Agency identified a third offense of misfeasance committed by Employee. It stated that on November 8, 2013, Employee was issued a Notice of Final Decision on Proposed Suspension. Employee was suspended for thirty days based on a charge of misfeasance which occured on June 13, 2013. Thus, Agency opined that the penalty in this matter should be affirmed because Employee's termination was permitted under the TAP.[6]

The AJ issued an Initial Decision on November 30, 2016. First, he addressed Employee's contention that Agency violated D.C. Official Code § 5-1031, commonly referred to as the "90-

[4] *Agency Answer to Petition for Appeal* (April 9, 2015).
[5] *Remand Order to Agency* (October 27, 2016).
[6] *Agency's Response to Remand Order* (November 4, 2016)

day rule." This rule prohibits an adverse action commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause. However, the AJ noted that § 5-1031(b) contains a tolling exception to the rule if the act or occurrence is the subject of a criminal investigation by the USAO or the Metropolitan Police Department. Although the USAO resolved its investigation on June 2, 2014 when it issued a Letter of Declination, the AJ stated that Agency's IAD did not complete its own internal investigation until September 25, 2014. Since Agency commenced its adverse action against Employee less than ninety days after IAD concluded its investigation, the AJ held that the 90-day rule was not violated.

Next, the AJ found that there was substantial evidence in the record that Employee accessed his private law client's medical records using Agency's resources without authorization. The AJ was unpersuaded by Employee's testimony based on his demeanor and lack of consistency. In addition, he determined that Employee's use of Agency's resources for his personal law practice constituted misfeasance. The AJ stated that Employee's on-duty actions constituted outside business activities that presented a conflict of interest with the fair and impartial performance of Employee's officially assigned duties. He also noted that Agency provided sufficient evidence to support a charge of dishonesty because Employee lied about accessing Ms. Jackson's medical records. With respect to the allegation that Employee utilized Agency's place of business, telephone, and fax number to advertise his private law practice on two websites, the AJ concluded that Agency failed to present any evidence to substantiate its claims. Notwithstanding this finding, the AJ concluded that Employee's misconduct constituted

an on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations.

Regarding the penalty, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that OEA must determine, *inter alia*, whether the penalty imposed upon an employee is within the range allowed by law, regulation, and any applicable Table of Penalties. In reviewing Agency's termination action, the AJ identified two instances, including the one forming the basis of this appeal, in which Agency sustained charges of misfeasance against Employee. While Employee argued that Agency should not have been afforded an opportunity to present evidence of a third offense of misfeasance because the record was closed at the conclusion of the hearing, the AJ cited to OEA Rule 630.1, which provides that an AJ may reopen the record to receive further evidence or arguments at any time prior to the issuance of the Initial Decision. Furthermore, he noted that no orders were issued to close the record after the hearing was concluded. Thus, Agency's November 4, 2016 Response to [the] Remand Order was permissible as part of the record. In sum, the AJ determined that Agency presented evidence of three charges of misfeasance against Employee. Accordingly, he held that Agency provided evidence of three charges of misfeasance and that a third charge carries a penalty of termination under the TAP.

Lastly, the AJ dismissed Employee's contention that Agency failed to consider the *Douglas* factors, discussed *infra*, when selecting the appropriate penalty.[7] However, after

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[7] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Although not an exhaustive list, the factors that an agency may consider are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

reviewing the charging documents, including the Notice of Final Decision, the AJ surmised that Agency adequately considered Employee's "behavior in relation to his job position and duties, veracity, timeliness, and signed agreement with Agency's Acceptable Use Agreement…." Therefore, he found that Agency carefully considered the *Douglas* factors, although it did not actually identify the factors as such. Moreover, the AJ stated that OEA has held that the failure to discuss the *Douglas* factors does not amount to a reversible error. Thus, he concluded that Agency met its burden of proof with respect to the charges levied against Employee and held that Agency did not abuse its managerial discretion in selecting the appropriate penalty. Accordingly, Employee's termination was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on January 3, 2017. He challenges several of the AJ's findings as a basis for granting his petition. First, Employee argues that his termination was unreasonable because Agency should have been estopped from using a prior charge of misfeasance in support of its decision to

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3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties; The notoriety of the offense or its impact upon the reputation of the agency;
8. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
9. Potential for the employee's rehabilitation;
10. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
11. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

terminate him. Employee also argues that Agency violated his procedural administrative due process rights by failing to appropriately consider the *Douglas* factors. In addition, he states that the AJ erred in interpreting the 90-day rule. Employee further asserts that his termination was conducted in bad faith and was a result of harassment and retaliation. Lastly, he believes that Agency failed to meet its burden of proof in sustaining a charge of misfeasance in this case. As a result, Employee posits that the Initial Decision was not based on substantial evidence.[8]

Agency filed a Response to Employee's Petition for Review on October 3, 2017. It argues that Employee's Petition for Review should be denied because he failed to articulate any cognizable grounds to overturn the Initial Decision. Agency further states that Employee has failed to show that the AJ's findings were not supported by substantial evidence. Lastly, Agency submits that the AJ correctly concluded that it did not violate the 90-day rule. Therefore, it requests that the Board deny Employee's Petition for Review.[9]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or

[8] *Petition for Review* (June 3, 2017). Employee also filed a Supplement to Petition for Review on July 26, 2017, wherein he offered additional documentation purporting to support his argument that Agency acted in bad faith during the USAO's investigation into his conduct.

[9] Agency did not submit its response until approximately nine months after Employee filed his petition (*See* OEA Rule 633.2). However, Employee's Certificate of Filing of his Petition for Review does not indicate that it was properly served to Agency. Therefore, this Board will consider the merits of Agency's arguments.

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

<u>Reasonableness of Penalty</u>

The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (misfeasance) is a suspension for fifteen days. A second offense carries a penalty of suspension for twenty to thirty days. The penalty for a third offense of misfeasance is termination. Employee argues that the AJ improperly permitted Agency to submit evidence of a third charge of misfeasance in support of its termination action because the matter was previously settled in October of 2016 after he filed a Whistleblower lawsuit. In support thereof, Employee offers newly-presented evidence of a complaint he filed in D.C. Superior Court on August 2, 2012. The complaint was subsequently settled and dismissed on October 24, 2016.[10]

However, the complaint that Employee cites to asserts that Agency violated the Whistleblower Protection Act when it suspended him for twenty-five days in July of 2012 for usurping the chain of command in a work-related matter. This is a separate and distinct charge from what Agency submitted in response to the AJ's Remand Order. Thus, Employee's argument is misplaced, as Agency did not rely on a matter that was previously settled to support its termination action.

Consequently, the Board finds that Employee's termination is based on three charges of misfeasance. The AJ did not err in finding that termination was appropriate under the

---

[10] *See Butler v. District of Columbia*, 2012 CA 006293 B (D.C. Super. Ct. 2016).

circumstances. We further conclude that Agency acted reasonably within the parameters established in the TAP, and that it did not abuse its discretion in choosing the penalty.[11]

Douglas Factors

Next, Employee asserts that Agency failed to properly consider the *Douglas* factors in selecting the appropriate penalty. In *Douglas v. Veterans Administration*, the Merit Systems Protection Board, OEA's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. In applying the factors, the MSPB cautioned that "[n]ot all of these factors will be pertinent in every case and frequently in the individual case, some of the pertinent factors will weigh in the [employee's] favor, while others may not, or may even constitute aggravating circumstances." Thus, the selection of an appropriate penalty must include a balancing of the relevant factors in an individual case.[12]

Here, Employee exercised his right to meet with Hearing Officer, Commander Keith Williams, to discuss Agency's proposed adverse action. Following the October 27, 2014 meeting, Commander Williams issued his Notice of Final Decision, sustaining the charges against Employee. In recommending the penalty of termination, Commander Williams highlighted several factors in support of his conclusion, including a determination that Employee's misconduct was intrinsically relevant to his position, job duties and/or job activities. Commander Williams further noted that Employee's actions were a clear violation of Agency rules. He also stated that Agency's improper identification of the "Acceptable Use Agreement" in its documents did not diminish Employee's culpability for his actions. After reviewing the

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[11] It bears noting that Employee believed that the record was closed at the conclusion of the evidentiary hearing. However, there is no evidence in the record to show that the AJ ordered the record to be closed prior to issuing his Initial Decision. Furthermore, the AJ had the discretion to keep the record open, or to re-open the record for the purpose of receiving further evidence prior to issuing his decision. *See* OEA Rules 629 and 630. In addition, under § DCPR 1606.2, adverse actions occurring within a three year period may be considered when imposing a penalty.
[12] *Id.*

facts and circumstances outlined in the charging and investigative documents, Commander Williams recommended that Employee be terminated from his position. While Agency did not specifically identify its considerations as "*Douglas* factors" in Employee's final notice, it is clear from the record that the reviewing officer considered some, but not all, of the elements enumerated in *Douglas*. This Board agrees with the AJ's conclusion that Agency carefully presented its justification for recommending the penalty of termination. As such, we will not disturb his finding.

90-Day Rule

Employee believes that the AJ erred in interpreting the 90-day rule. Thus, he believes that this Board should reverse Agency's termination action. D.C. Official Code § 5-1031 provides the following regarding the 90-day rule:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

It is well-settled that the 90-day deadline is a mandatory, rather than directory provision. [13] Therefore, any violation of the statute by an agency would result in a reversal of the adverse

[13] *McHugh v. Department of Human Services,* OEA Matter No. 1601-0012-95 (November 20, 1995); *Ross v. Department of Human Services,* OEA Matter No. 1601-0338-94 (May 15, 1995); *Robert L. King v. D.C. Housing Authority,* OEA Matter No. 1601-0062-98, p. 16 (May 24, 2000); *Velerie Jones-Coe v. Department of Human*

action. The only exception to this rule lies within subsection (b) of the statue. Under § 5-1031(b), the ninety-day deadline shall be tolled until the conclusion of the criminal investigation.

In *Timothy Ebert v. Metropolitan Police Department,* OEA Matter No. 1601-0223-98, *Opinion and Order on Petition for Review* (December 31, 2002), this Board held that "the date of the declination letter is an objective 'bright line' signaling the end of a criminal investigation." The Board reasoned that agencies should not have to guess about the date the deadline begins to run because, in accordance with the statute, it is tolled as long as there is an on-going criminal investigation. Moreover, the OEA Board has previously determined that a formal decision declining prosecution concludes the investigation.[14] The Superior Court for the District of Columbia held in *District of Columbia v. District of Columbia Office of Employee Appeals and Robert L. Jordan,* 883 A.2d 124 (2005), that "the natural meaning of the statutory language . . . is that the 'conclusion of a criminal investigation' must involve action taken by an entity with prosecutorial authority—that is, the authority to review evidence, and to either charge an individual with the commission of a criminal offense, or decide that charges should not be filed."

In this case, the act allegedly constituting cause occurred on July 22, 2013, when Employee used his Agency log-in and password credentials to check the status of his personal law client's medical records without authorization from a supervisor. Agency was not apprised of Employee's actions until September 12, 2013, when ORM informed the Human Resources Department of Employee's misconduct. The tolling exception under D.C. Official Code § 5-1031(b) was triggered because the allegations against Employee were the subject of a criminal investigation by the United States Attorney's Office. However, on June 2, 2014, the United

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Services, OEA Matter No. 1601-0088-99, p. 3 (June 7, 2002); *Curtis Adamson v. Metropolitan Police Department,* OEA Matter No. 1601-0041-04 (February 14, 2006); and *Sherman Lankford v. Metropolitan Police Department,* OEA Matter No. 1601-0147-06, (March 26, 2007).

[14] *Sholanda Miller v. Metropolitian Police Department*, OEA Matter No. 1601-0325-10. *Opinion and Order on Petition for Review* (April 14, 2015)

States Attorney made a decision not to charge Employee with a criminal offense after reviewing the evidence.[15] Therefore, based on the holdings in *Ebert* and *Jordan*, the conclusion of the criminal investigation occurred with the Letter of Declination. Agency subsequently had ninety business days to serve Employee with written notice of proposed adverse action. Agency issued its Advance Notice of Proposed Termination on October 6, 2014, eighty-eight business days after it proposed Employee's termination. Accordingly, Agency did not violate the 90-day rule and was compliant with the requirements of D.C. Official Code § 5-1031(b).

Burden of Proof

According to Employee, Agency failed to meet its burden of proof in this matter because it failed to produce evidence to show that the termination action was taken for cause. He claims that "best evidence, recordings/transcripts of witness interviews were ignored" and that "all pertinent issues of law and fact on record…were not properly raised and addressed, for example, documentation of a records breach, monetary incentives for representation, unit co-employees in similar worse situations unpunished and union membership protections."[16] In addition, Employee states that Agency acted in bad faith, exhibited malice, harassment and retaliated against him.

OEA Rule 628.1 provides that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue. This Board disagrees with Employee's assertions and finds that the AJ correctly determined that Agency met its burden of proof with respect to the charge of misfeasance.

[15] *Agency Answer to Petition for Appeal*, Tab 7.
[16] *Petition for Review*.

After adducing both documentary and testimonial evidence from both parties, the AJ concluded that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause. While Employee takes exception with the AJ's conclusions, there is no evidence in the record to indicate that the AJ failed to consider all of the evidence that was submitted during the course of this appeal. He found Agency's witnesses to be credible in supporting the claim that Employee impermissibly accessed his law client's medical records using Agency resources. Employee's misconduct violated Agency's internal rules and subjected him to legal and administrative charges.

Conversely, the AJ found Employee's testimony to be inconsistent and lacking in credibility. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[17]

Based on the foregoing, we are unpersuaded by each argument presented in Employee's Petition for Review. Employee was afforded the opportunity to present evidence in support of each of his arguments. However, he could not substantiate these claims. Thus, this Board finds that the AJ reasonably concluded that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause. We further note that many of Employee's arguments are

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[17] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

merely disagreements with the AJ's findings of fact and conclusions of law. These disagreements are not a valid basis for appeal.[18]

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[19] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. In this case, the AJ's findings were based on substantial evidence. His conclusions of law flowed rationally from the evidence presented. Accordingly, Agency's adverse action was taken for cause and the penalty of termination was appropriate under the circumstances. Consequently, Employee's Petition for Review must be denied.

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[18] *See Michael Dunn v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review* (April 15, 2014); *Gwendolyn Gilmore v. District of Columbia. Public Schools*, OEA Matter No. 1601- 0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); and *Garnetta Hunt v. Department of Corrections*, OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015).

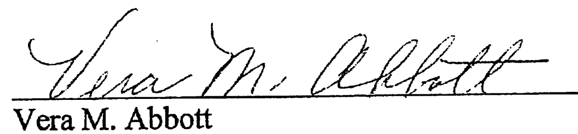
[19] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

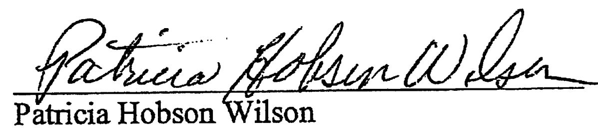
Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

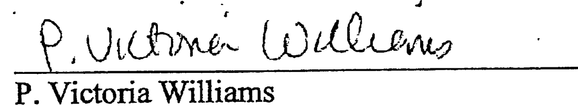
Sheree L. Price, Chair



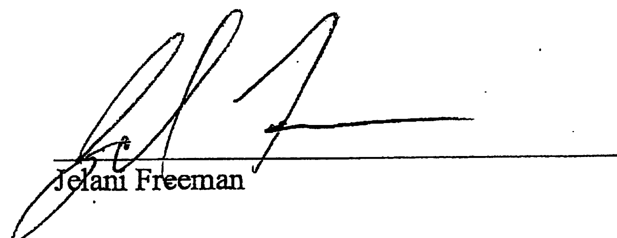
Vera M. Abbott



Patricia Hobson Wilson



P. Victoria Williams



Jelani Freeman

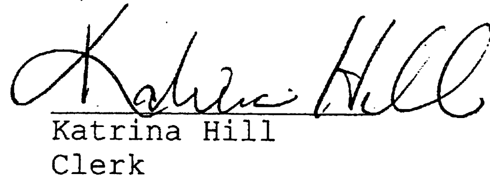
Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Widmon Butler
1717 R Street, NW
Apt. 202
Washington, DC 20009

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001



Katrina Hill
Clerk

November 7, 2017
Date

Filed
D.C. Superior Court
11/21/2017 13:45PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

In the matter of:

WIDMON BUTLER,
1717 R Street NW, Apt. 202
Washington, DC 20009

Petitioner,

v.

METROPOLITAN POLICE DEPARTMENT,
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

and

D.C. OFFICE OF EMPLOYEE APPEALS
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Respondents.

2017 CA 007843 P(MPA)

PETITION FOR REVIEW OF AGENCY DECISION

Notice is hereby given that Petitioner Widmon Butler, by and through counsel, appeals to the Superior Court of the District of Columbia from the District of Columbia Office of Employee Appeals ("OEA") Board Order issued on the 7th day of November, 2017. A copy of the Order sought to be reviewed is attached to this petition as Exhibit 1.

Petitioner worked as a Claims Examiner with the District of Columbia Metropolitan Police Department (the "Agency"), and the Agency issued a Notice of Final Decision ("Notice") on February 5, 2015, terminating Petitioner effective February 6, 2017. The Notice charged Mr. Butler with interfering with the efficiency or integrity of government operations and engaging in outside employment that conflicts with the impartial performance of his duties. Ex. 1 at 2. Mr.

Butler appealed the Notice to the OEA on March 6, 2015, and the OEA issued a Remand Order to the Agency on October 18, 2016, concluding that the Agency failed to provide any evidence to justify the termination penalty, including three offenses of misfeasance. *Id.* at 2-3. Post hoc, the Agency provided a third allegation of misfeasance and the OEA issued an Initial Decision on November 30, 2016 upholding the termination decision. *Id.* at 2-6. The Petitioner submitted a Petition for Review to the OEA Board, and the Board incorrectly found that the Initial Decision was based on substantial evidence in the record. Further, the OEA misinterpreted the ninety-day deadline to bring an adverse action against a police officer. *See id.* at 10-11. Petitioner hereby files this Petition for Review of the OEA's final November 7, 2017 decision, upholding the Agency's decisions to terminate Petitioner.

Address of Respondent Agency or Official:

D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Names and Addresses of all other parties to the Agency proceeding:

Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Names and addresses of parties or attorneys to be served:

Karl A. Racine
Office of the Attorney General
441 4th Street, NW, Suite 1100S
Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
1100 4th St SW, Suite 620 East
Washington, DC 20024-4451
Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Respectfully submitted,

/s/ David A. Branch

David A. Branch
Law Office of David A. Branch and
Associates, PLLC
1828 L Street, NW, Suite 820
Washington, D.C. 20036
(202) 785.2805 phone
(202) 785.0289 fax
davidbranch@dbranchlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2017 a copy of the foregoing was served on the following by first-class mail:

Karl A. Racine
Office of the Attorney General
441 4th Street, NW, Suite 1100S
Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Respectfully submitted,

/s/ David A. Branch
David A. Branch

Exhibit 1

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WIDMON BUTLER, Employee	OEA Matter No.: 1601-0049-15
v.	
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: November 7, 2017

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Civilian Claim Specialist with the Metropolitan Police Department's ("Agency") Medical Services Branch ("MSB"). On July 22, 2013, while on duty, Employee accessed the medical records of Josephine Jackson, a civilian Agency employee, without authorization. Employee subsequently contacted the Director of the Office of Risk Management, stating that he was Ms. Jackson's attorney and that he was retained to ascertain the status of her workers' compensation claim.[1] Agency's Director of Human Resources was subsequently apprised of Employee's actions and forwarded the information to

[1] Employee admitted that he represented Ms. Jackson in a pro bono capacity in her workers' compensation claim against the Office of Risk Management and that he had written authorization to access Ms. Jackson's medical records. Employee further conceded that he understood and signed the Police & Fire Clinic's Acceptable Use Agreement related to his employment with Agency.

the Internal Affairs Department ("IAD") for investigation. Employee was placed on administrative leave with pay while IAD and the United States Attorney's Office ("USAO") conducted a review of the matter. On June 2, 2014, the USAO declined to prosecute Employee. On September 25, 2014, the IAD submitted its final investigative report to the Assistant Chief of Police.

As a result, Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations: misfeasance; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources; using or authorizing the use of government resources for other than official business." Employee was also charged with violating Chapter 18, Section 1800.3 of the D.C. Personnel Regulations ("DCPR"), which prohibits District employees from engaging in outside employment or private business that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.[2] A Hearing Officer appointed to conduct an administrative review of the charges against Employee recommended that he be terminated. On February 5, 2015, Agency issued its Notice of Final Decision. Employee's termination was effective on February 6, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 6, 2015. In his appeal, Employee denied the charges against him and stated that his actions forming the basis of his termination were substantially performed while off-duty. Employee also asserted that he was innocent of each charge and specification and requested that he be reinstated with back pay and benefits.[3]

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[2] *Agency's Answer to Petition for Appeal*, Tab 2 (April 9, 2015). The charges levied against Employee included: Charge No. 1, Specifications Nos. 1, 2, and 3; and Charge No. 2, Specification No.1.
[3] *Petition for Appeal* (March 6, 2015).

Agency filed its Answer to the Petition for Appeal on April 9, 2015. It denied Employee's substantive claims and requested that an evidentiary hearing be held.[4] An OEA Administrative Judge ("AJ") was assigned to the matter on May 27, 2015. On September 11, 2015, the AJ issued a Third Order Convening a Prehearing Conference to assess the parties' arguments. After determining that there were material issues of fact in dispute, the AJ held a hearing, wherein the parties presented testimonial and documentary evidence in support of their positions.

After reviewing the hearing transcript,. the AJ issued a Remand Order to Agency on October 18, 2016. According to the AJ, Agency failed to present any evidence during the hearing to justify imposing a penalty beyond what was allowable under the Table of Appropriate Penalties ("TAP") in Chapter 16 of the District Personnel Manual ("DPM"). Specifically, he stated that to support termination under the TAP, Agency was required to prove that Employee committed three offenses of misfeasance. Since the AJ believed that Agency only presented two instances wherein Employee was disciplined for misfeasance, the matter was remanded to determine the proper penalty to impose against Employee in accordance with the TAP.[5]

In response to the AJ's order, Agency identified a third offense of misfeasance committed by Employee. It stated that on November 8, 2013, Employee was issued a Notice of Final Decision on Proposed Suspension. Employee was suspended for thirty days based on a charge of misfeasance which occured on June 13, 2013. Thus, Agency opined that the penalty in this matter should be affirmed because Employee's termination was permitted under the TAP.[6]

The AJ issued an Initial Decision on November 30, 2016. First, he addressed Employee's contention that Agency violated D.C. Official Code § 5-1031, commonly referred to as the "90-

[4] *Agency Answer to Petition for Appeal* (April 9, 2015).
[5] *Remand Order to Agency* (October 27, 2016).
[6] *Agency's Response to Remand Order* (November 4, 2016)

day rule." This rule prohibits an adverse action commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause. However, the AJ noted that § 5-1031(b) contains a tolling exception to the rule if the act or occurrence is the subject of a criminal investigation by the USAO or the Metropolitan Police Department. Although the USAO resolved its investigation on June 2, 2014 when it issued a Letter of Declination, the AJ stated that Agency's IAD did not complete its own internal investigation until September 25, 2014. Since Agency commenced its adverse action against Employee less than ninety days after IAD concluded its investigation, the AJ held that the 90-day rule was not violated.

Next, the AJ found that there was substantial evidence in the record that Employee accessed his private law client's medical records using Agency's resources without authorization. The AJ was unpersuaded by Employee's testimony based on his demeanor and lack of consistency. In addition, he determined that Employee's use of Agency's resources for his personal law practice constituted misfeasance. The AJ stated that Employee's on-duty actions constituted outside business activities that presented a conflict of interest with the fair and impartial performance of Employee's officially assigned duties. He also noted that Agency provided sufficient evidence to support a charge of dishonesty because Employee lied about accessing Ms. Jackson's medical records. With respect to the allegation that Employee utilized Agency's place of business, telephone, and fax number to advertise his private law practice on two websites, the AJ concluded that Agency failed to present any evidence to substantiate its claims. Notwithstanding this finding, the AJ concluded that Employee's misconduct constituted

an on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations.

Regarding the penalty, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that OEA must determine, *inter alia*, whether the penalty imposed upon an employee is within the range allowed by law, regulation, and any applicable Table of Penalties. In reviewing Agency's termination action, the AJ identified two instances, including the one forming the basis of this appeal, in which Agency sustained charges of misfeasance against Employee. While Employee argued that Agency should not have been afforded an opportunity to present evidence of a third offense of misfeasance because the record was closed at the conclusion of the hearing, the AJ cited to OEA Rule 630.1, which provides that an AJ may reopen the record to receive further evidence or arguments at any time prior to the issuance of the Initial Decision. Furthermore, he noted that no orders were issued to close the record after the hearing was concluded. Thus, Agency's November 4, 2016 Response to [the] Remand Order was permissible as part of the record. In sum, the AJ determined that Agency presented evidence of three charges of misfeasance against Employee. Accordingly, he held that Agency provided evidence of three charges of misfeasance and that a third charge carries a penalty of termination under the TAP.

Lastly, the AJ dismissed Employee's contention that Agency failed to consider the *Douglas* factors, discussed *infra*, when selecting the appropriate penalty.[7] However, after

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[7] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Although not an exhaustive list, the factors that an agency may consider are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

reviewing the charging documents, including the Notice of Final Decision, the AJ surmised that Agency adequately considered Employee's "behavior in relation to his job position and duties, veracity, timeliness, and signed agreement with Agency's Acceptable Use Agreement…." Therefore, he found that Agency carefully considered the *Douglas* factors, although it did not actually identify the factors as such. Moreover, the AJ stated that OEA has held that the failure to discuss the *Douglas* factors does not amount to a reversible error. Thus, he concluded that Agency met its burden of proof with respect to the charges levied against Employee and held that Agency did not abuse its managerial discretion in selecting the appropriate penalty. Accordingly, Employee's termination was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on January 3, 2017. He challenges several of the AJ's findings as a basis for granting his petition. First, Employee argues that his termination was unreasonable because Agency should have been estopped from using a prior charge of misfeasance in support of its decision to

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3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties; The notoriety of the offense or its impact upon the reputation of the agency;
8. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
9. Potential for the employee's rehabilitation;
10. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
11. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

terminate him. Employee also argues that Agency violated his procedural administrative due process rights by failing to appropriately consider the *Douglas* factors. In addition, he states that the AJ erred in interpreting the 90-day rule. Employee further asserts that his termination was conducted in bad faith and was a result of harassment and retaliation. Lastly, he believes that Agency failed to meet its burden of proof in sustaining a charge of misfeasance in this case. As a result, Employee posits that the Initial Decision was not based on substantial evidence.[8]

Agency filed a Response to Employee's Petition for Review on October 3, 2017. It argues that Employee's Petition for Review should be denied because he failed to articulate any cognizable grounds to overturn the Initial Decision. Agency further states that Employee has failed to show that the AJ's findings were not supported by substantial evidence. Lastly, Agency submits that the AJ correctly concluded that it did not violate the 90-day rule. Therefore, it requests that the Board deny Employee's Petition for Review.[9]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or

[8] *Petition for Review* (June 3, 2017). Employee also filed a Supplement to Petition for Review on July 26, 2017, wherein he offered additional documentation purporting to support his argument that Agency acted in bad faith during the USAO's investigation into his conduct.

[9] Agency did not submit its response until approximately nine months after Employee filed his petition (*See* OEA Rule 633.2). However, Employee's Certificate of Filing of his Petition for Review does not indicate that it was properly served to Agency. Therefore, this Board will consider the merits of Agency's arguments.

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Reasonableness of Penalty

The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (misfeasance) is a suspension for fifteen days. A second offense carries a penalty of suspension for twenty to thirty days. The penalty for a third offense of misfeasance is termination. Employee argues that the AJ improperly permitted Agency to submit evidence of a third charge of misfeasance in support of its termination action because the matter was previously settled in October of 2016 after he filed a Whistleblower lawsuit. In support thereof, Employee offers newly-presented evidence of a complaint he filed in D.C. Superior Court on August 2, 2012. The complaint was subsequently settled and dismissed on October 24, 2016.[10]

However, the complaint that Employee cites to asserts that Agency violated the Whistleblower Protection Act when it suspended him for twenty-five days in July of 2012 for usurping the chain of command in a work-related matter. This is a separate and distinct charge from what Agency submitted in response to the AJ's Remand Order. Thus, Employee's argument is misplaced, as Agency did not rely on a matter that was previously settled to support its termination action.

Consequently, the Board finds that Employee's termination is based on three charges of misfeasance. The AJ did not err in finding that termination was appropriate under the

[10] *See Butler v. District of Columbia*, 2012 CA 006293 B (D.C. Super. Ct. 2016).

circumstances. We further conclude that Agency acted reasonably within the parameters established in the TAP, and that it did not abuse its discretion in choosing the penalty.[11]

Douglas Factors

Next, Employee asserts that Agency failed to properly consider the *Douglas* factors in selecting the appropriate penalty. In *Douglas v. Veterans Administration*, the Merit Systems Protection Board, OEA's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. In applying the factors, the MSPB cautioned that "[n]ot all of these factors will be pertinent in every case and frequently in the individual case, some of the pertinent factors will weigh in the [employee's] favor, while others may not, or may even constitute aggravating circumstances." Thus, the selection of an appropriate penalty must include a balancing of the relevant factors in an individual case.[12]

Here, Employee exercised his right to meet with Hearing Officer, Commander Keith Williams, to discuss Agency's proposed adverse action. Following the October 27, 2014 meeting, Commander Williams issued his Notice of Final Decision, sustaining the charges against Employee. In recommending the penalty of termination, Commander Williams highlighted several factors in support of his conclusion, including a determination that Employee's misconduct was intrinsically relevant to his position, job duties and/or job activities. Commander Williams further noted that Employee's actions were a clear violation of Agency rules. He also stated that Agency's improper identification of the "Acceptable Use Agreement" in its documents did not diminish Employee's culpability for his actions. After reviewing the

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[11] It bears noting that Employee believed that the record was closed at the conclusion of the evidentiary hearing. However, there is no evidence in the record to show that the AJ ordered the record to be closed prior to issuing his Initial Decision. Furthermore, the AJ had the discretion to keep the record open, or to re-open the record for the purpose of receiving further evidence prior to issuing his decision. *See* OEA Rules 629 and 630. In addition, under § DCPR 1606.2, adverse actions occurring within a three year period may be considered when imposing a penalty.
[12] *Id.*

facts and circumstances outlined in the charging and investigative documents, Commander Williams recommended that Employee be terminated from his position. While Agency did not specifically identify its considerations as "*Douglas* factors" in Employee's final notice, it is clear from the record that the reviewing officer considered some, but not all, of the elements enumerated in *Douglas*. This Board agrees with the AJ's conclusion that Agency carefully presented its justification for recommending the penalty of termination. As such, we will not disturb his finding.

90-Day Rule

Employee believes that the AJ erred in interpreting the 90-day rule. Thus, he believes that this Board should reverse Agency's termination action. D.C. Official Code § 5-1031 provides the following regarding the 90-day rule:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

It is well-settled that the 90-day deadline is a mandatory, rather than directory provision. [13] Therefore, any violation of the statute by an agency would result in a reversal of the adverse

[13] *McHugh v. Department of Human Services,* OEA Matter No. 1601-0012-95 (November 20, 1995); *Ross v. Department of Human Services,* OEA Matter No. 1601-0338-94 (May 15, 1995); *Robert L. King v. D.C. Housing Authority,* OEA Matter No. 1601-0062-98, p. 16 (May 24, 2000); *Velerie Jones-Coe v. Department of Human*

action. The only exception to this rule lies within subsection (b) of the statue. Under § 5-1031(b), the ninety-day deadline shall be tolled until the conclusion of the criminal investigation.

In *Timothy Ebert v. Metropolitan Police Department,* OEA Matter No. 1601-0223-98, *Opinion and Order on Petition for Review* (December 31, 2002), this Board held that "the date of the declination letter is an objective 'bright line' signaling the end of a criminal investigation." The Board reasoned that agencies should not have to guess about the date the deadline begins to run because, in accordance with the statute, it is tolled as long as there is an on-going criminal investigation. Moreover, the OEA Board has previously determined that a formal decision declining prosecution concludes the investigation.[14] The Superior Court for the District of Columbia held in *District of Columbia v. District of Columbia Office of Employee Appeals and Robert L. Jordan,* 883 A.2d 124 (2005), that "the natural meaning of the statutory language . . . is that the 'conclusion of a criminal investigation' must involve action taken by an entity with prosecutorial authority—that is, the authority to review evidence, and to either charge an individual with the commission of a criminal offense, or decide that charges should not be filed."

In this case, the act allegedly constituting cause occurred on July 22, 2013, when Employee used his Agency log-in and password credentials to check the status of his personal law client's medical records without authorization from a supervisor. Agency was not apprised of Employee's actions until September 12, 2013, when ORM informed the Human Resources Department of Employee's misconduct. The tolling exception under D.C. Official Code § 5-1031(b) was triggered because the allegations against Employee were the subject of a criminal investigation by the United States Attorney's Office. However, on June 2, 2014, the United

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Services, OEA Matter No. 1601-0088-99, p. 3 (June 7, 2002); *Curtis Adamson v. Metropolitan Police Department,* OEA Matter No. 1601-0041-04 (February 14, 2006); and *Sherman Lankford v. Metropolitan Police Department,* OEA Matter No. 1601-0147-06, (March 26, 2007).

[14] *Sholanda Miller v. Metropolitian Police Department,* OEA Matter No. 1601-0325-10. *Opinion and Order on Petition for Review* (April 14, 2015)

States Attorney made a decision not to charge Employee with a criminal offense after reviewing the evidence.[15] Therefore, based on the holdings in *Ebert* and *Jordan*, the conclusion of the criminal investigation occurred with the Letter of Declination. Agency subsequently had ninety business days to serve Employee with written notice of proposed adverse action. Agency issued its Advance Notice of Proposed Termination on October 6, 2014, eighty-eight business days after it proposed Employee's termination. Accordingly, Agency did not violate the 90-day rule and was compliant with the requirements of D.C. Official Code § 5-1031(b).

Burden of Proof

According to Employee, Agency failed to meet its burden of proof in this matter because it failed to produce evidence to show that the termination action was taken for cause. He claims that "best evidence, recordings/transcripts of witness interviews were ignored" and that "all pertinent issues of law and fact on record…were not properly raised and addressed, for example, documentation of a records breach, monetary incentives for representation, unit co-employees in similar worse situations unpunished and union membership protections."[16] In addition, Employee states that Agency acted in bad faith, exhibited malice, harassment and retaliated against him.

OEA Rule 628.1 provides that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue. This Board disagrees with Employee's assertions and finds that the AJ correctly determined that Agency met its burden of proof with respect to the charge of misfeasance.

[15] *Agency Answer to Petition for Appeal*, Tab 7.
[16] *Petition for Review*.

After adducing both documentary and testimonial evidence from both parties, the AJ concluded that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause. While Employee takes exception with the AJ's conclusions, there is no evidence in the record to indicate that the AJ failed to consider all of the evidence that was submitted during the course of this appeal. He found Agency's witnesses to be credible in supporting the claim that Employee impermissibly accessed his law client's medical records using Agency resources. Employee's misconduct violated Agency's internal rules and subjected him to legal and administrative charges.

Conversely, the AJ found Employee's testimony to be inconsistent and lacking in credibility. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[17]

Based on the foregoing, we are unpersuaded by each argument presented in Employee's Petition for Review. Employee was afforded the opportunity to present evidence in support of each of his arguments. However, he could not substantiate these claims. Thus, this Board finds that the AJ reasonably concluded that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause. We further note that many of Employee's arguments are

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[17] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

merely disagreements with the AJ's findings of fact and conclusions of law. These disagreements are not a valid basis for appeal.[18]

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[19] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. In this case, the AJ's findings were based on substantial evidence. His conclusions of law flowed rationally from the evidence presented. Accordingly, Agency's adverse action was taken for cause and the penalty of termination was appropriate under the circumstances. Consequently, Employee's Petition for Review must be denied.

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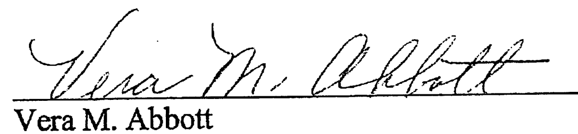
[18] *See Michael Dunn v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review* (April 15, 2014); *Gwendolyn Gilmore v. District of Columbia. Public Schools*, OEA Matter No. 1601- 0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); and *Garnetta Hunt v. Department of Corrections*, OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015).
[19] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

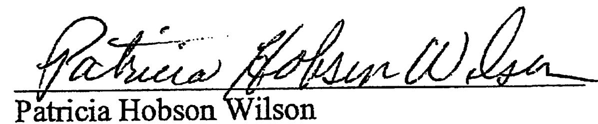
Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

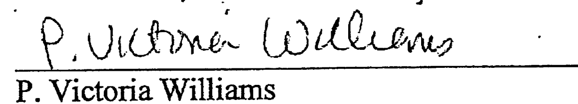
Sheree L. Price, Chair



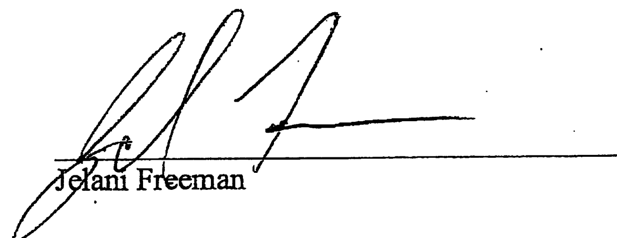
Vera M. Abbott



Patricia Hobson Wilson



P. Victoria Williams



Jelani Freeman

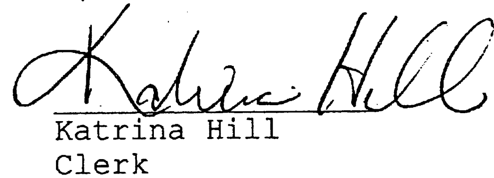
Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

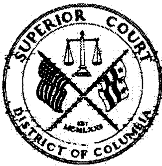
Widmon Butler
1717 R Street, NW
Apt. 202
Washington, DC 20009

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001



Katrina Hill
Clerk

November 7, 2017
Date



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

WIDMON BUTLER
Vs.
METROPOLITAN POLICE DEPARTMENT et al

C.A. No. 2017 CA 007843 P(MPA)

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge CIVIL CAL 5 JUDGE CORDERO
Date: November 27, 2017
Initial Conference: 9:30 am, Friday, March 02, 2018
Location: Courtroom 200
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www.dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

RECEIVED
Civil Clerk's Office
JAN 17 2018
Superior Court of the
District of Columbia
Washington, D.C.

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

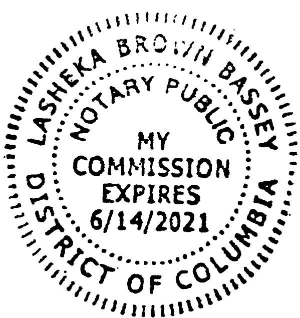
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

WIDMON BUTLER, Petitioner, v. METROPOLITAN POLICE DEPARTMENT et al., Respondent.	Case No. 2017 CA 007843 P(MPA) Judge Robert E. Morin

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Widmon Butler v. Metropolitan Police Department,* OEA Matter No. 1601-0049-15. The record consists of two volumes containing forty-four (44) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist



District of Columbia: SS
Subscribed and Sworn to before me
this 16th day of January, 2018
Lasheka B. Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

RECEIVED
12:53
OFFICE OF EMPLOYEE APPEALS

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Miss BEVERLY DAY
Vs. C.A. No. 2016 CA 005498 P(MPA)
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("SCR Civ") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the Summons, the Complaint, and this Initial Order. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in SCR Civ 4(m).

(3) Within 20 days of service as described above, except as otherwise noted in SCR Civ 12, each defendant must respond to the Complaint by filing an Answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in SCR Civ 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an Initial Scheduling and Settlement Conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than six business days before the scheduling conference date. No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each Judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/

Chief Judge Robert E. Morin

Case Assigned to: Judge TODD E EDELMAN
Date: May 15, 2017
Initial Conference: 9:30 am, Friday, June 23, 2017
Location: Courtroom 212
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

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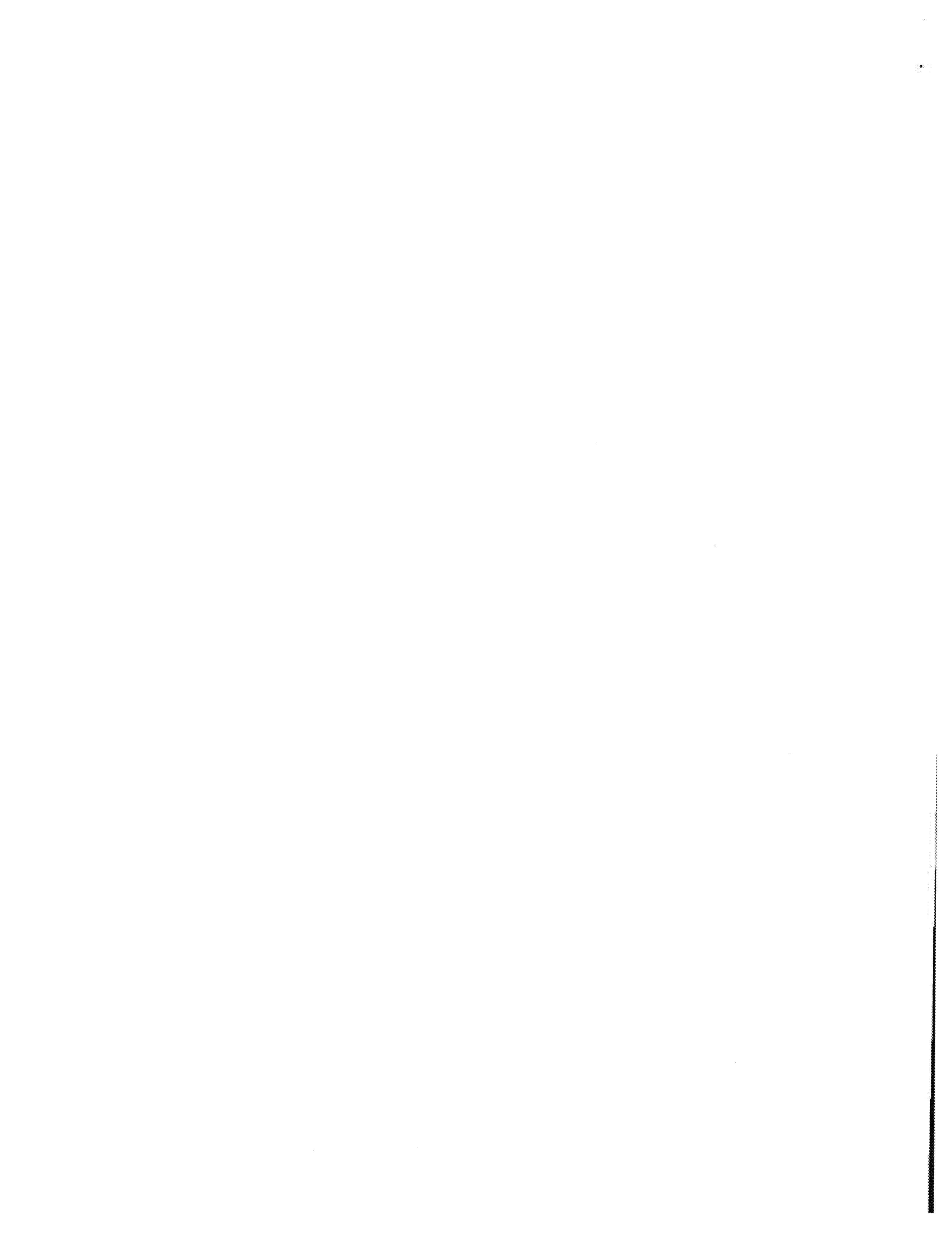


ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

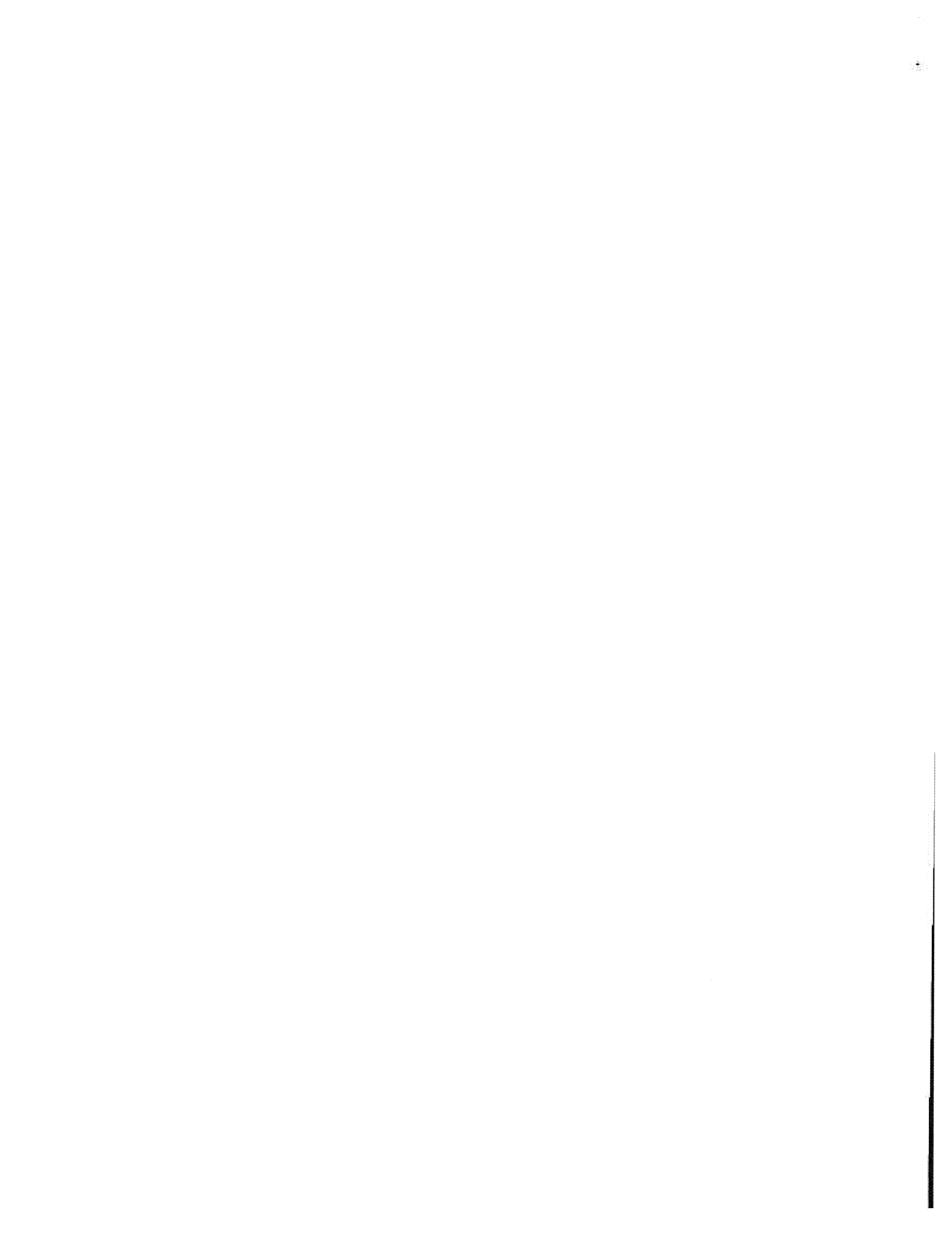
To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www.dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Clerk's Office. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin



IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

BEVERLY DAY,

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF PUBLIC WORKS

Respondent.

MPA No.: 16-0005498

FIRST AMENDED PETITION FOR REVIEW OF AGENCY DECISION

COMES NOW, the Petitioner, Beverly Day ("Day" or "Petitioner") by counsel, and hereby petition's this court for a review of the Respondent's, District of Columbia Department of Public Works ("DPW" or "Agency"), agency order to remove Day from her position as a staff assistant. In support of her Petition Day asserts the following:

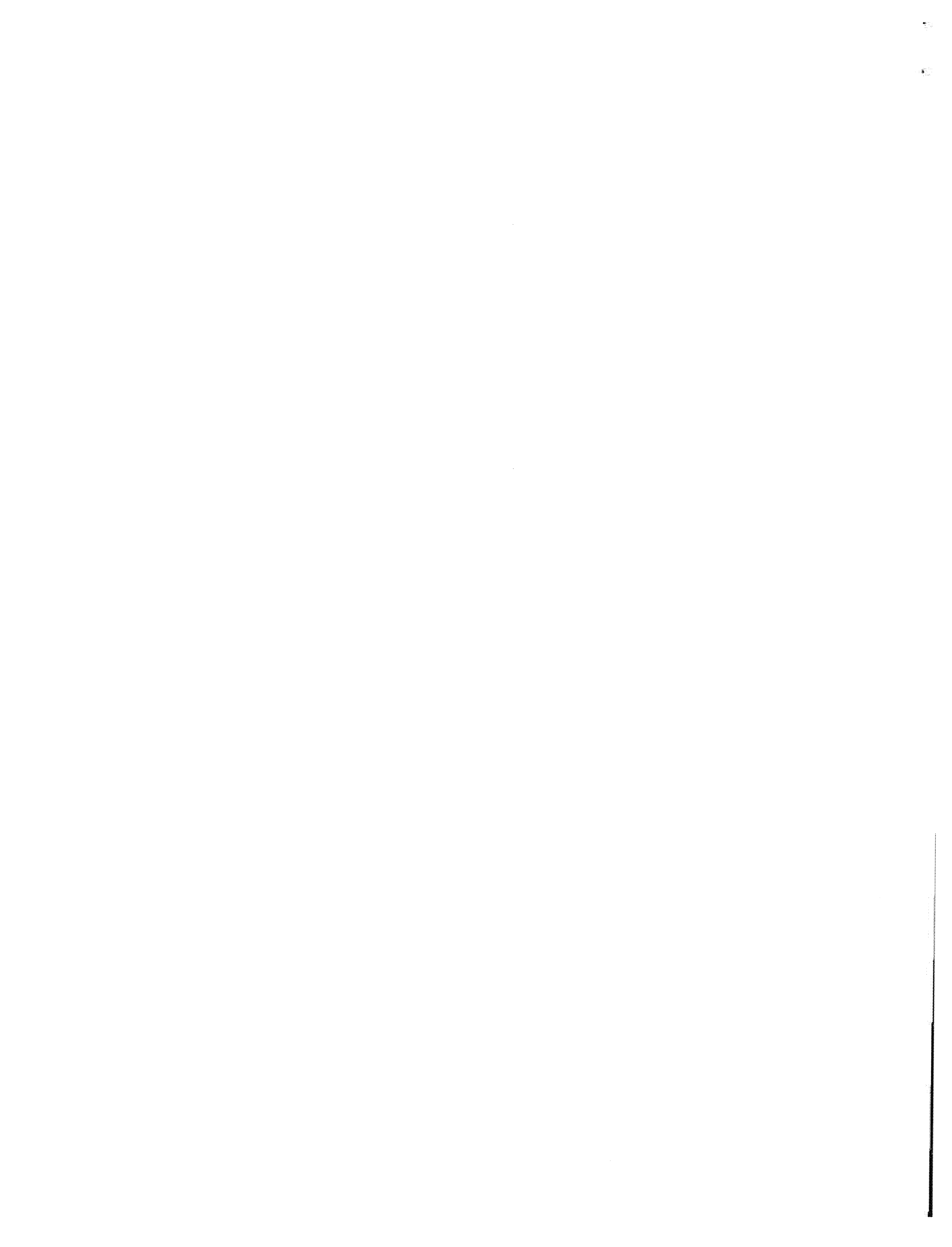
1. The Order that is the subject of this petition was issued on July 6, 2016 (the "Final Order"). A copy of that order and decision is incorporated herein by reference and attached to this Petition as Exhibit A.

2. The Final Order upholds Agencies decision to remove Day from her position as a Staff Assistant.

PROCEDURAL HISTORY

3. Day was terminated by DPW on October 25, 2011 for "any on duty employment-related act or omission that an employee knew or should reasonably know is a violations of law: assault or fighting on duty."

4. Day filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office")



on November 24, 2011. The Agency filed its Answer on December 20, 2011.

5. A prehearing conference was scheduled on November 1, 2013. It was determined that an evidentiary hearing was warranted.

6. The evidentiary hearing was conducted on May 13, 2014.

7. On July 7, 2014 OAE issued a written decision reversing the Agency's termination, reinstating Day, and providing her with all back pay and benefits lost since her termination ("First Order"). A copy of this ruling is incorporated herein by reference and attached to this Petition as Exhibit B.

7. On August 11, 2014 DPW filed a Petition for Review asserting that the July 7, 2014 ruling was not based on substantial evidence.

8. On April 13, 2016 the OEA Board issued an Opinion and Order on Petition for Review remanding this matter to the same Administrative Judge with instruction to properly analyze the facts of this case using the actual definitions of assault relied upon by Agency.

9. Pursuant to the OEA Board's ruling, the Final Order that is the subject of this appeal was issued on July 6, 2016.

10. Petitioner timely filed her appeal and leave to file this Amended Petition was granted by the Court.

REVIEW REQUESTED

11. Day is requesting review of the Final Order entered on July 6, 2016, which upheld the agency's ruling to terminate Day and deny her back pay and compensation for lost benefits.

12. The review sought is based on numerous grounds, including but not limited to, requesting the court hold the ruling unlawful and set aside the action, finding, or conclusions as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and/or unsupported

by substantial evidence in the record of the proceedings before the Court.

RELIEF REQUESTED

13. Day is seeking for the Court to Reverse the OAE Final Order and/or the Agency decision to terminate her position.

14. Day has been damaged and continues to suffer damages as a result of DPW's actions. As a result, Day is requesting reinstatement, back-pay, front pay, compensation for lost benefits, attorney fees, and pre and post judgment interest.

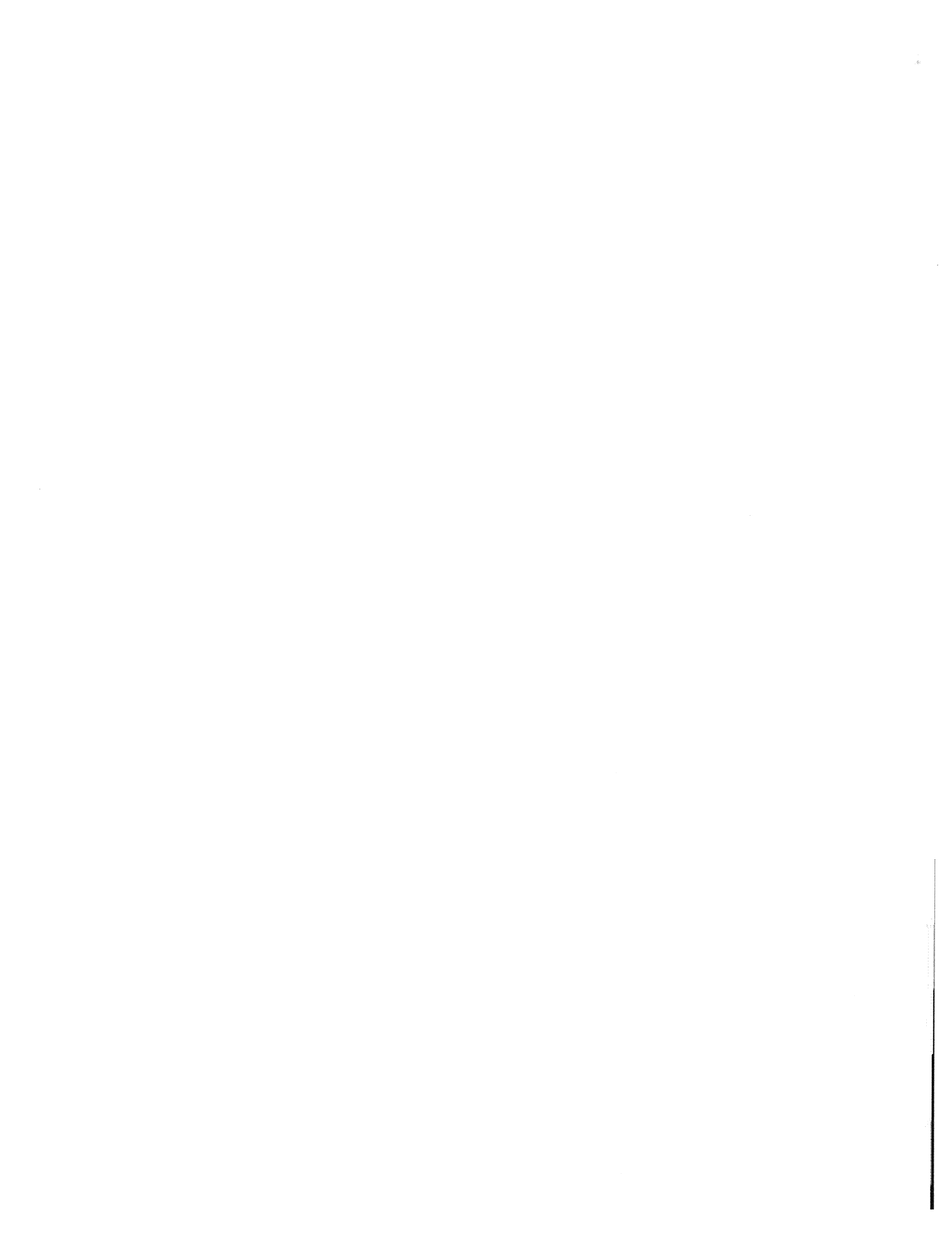
WHEREFORE, Petitioner requests that this Honorable Court reverse OAE's Final Order upholding DPW's decision to terminate her position, reverse DPW's decision to terminate her position and immediately reinstate Day, and to order DPW to compensate Day for all back pay, front pay, compensation for lost benefits, attorney fees, and pre and post judgment interest related to this action.

Respectfully submitted,

Beverly Day

By Counsel

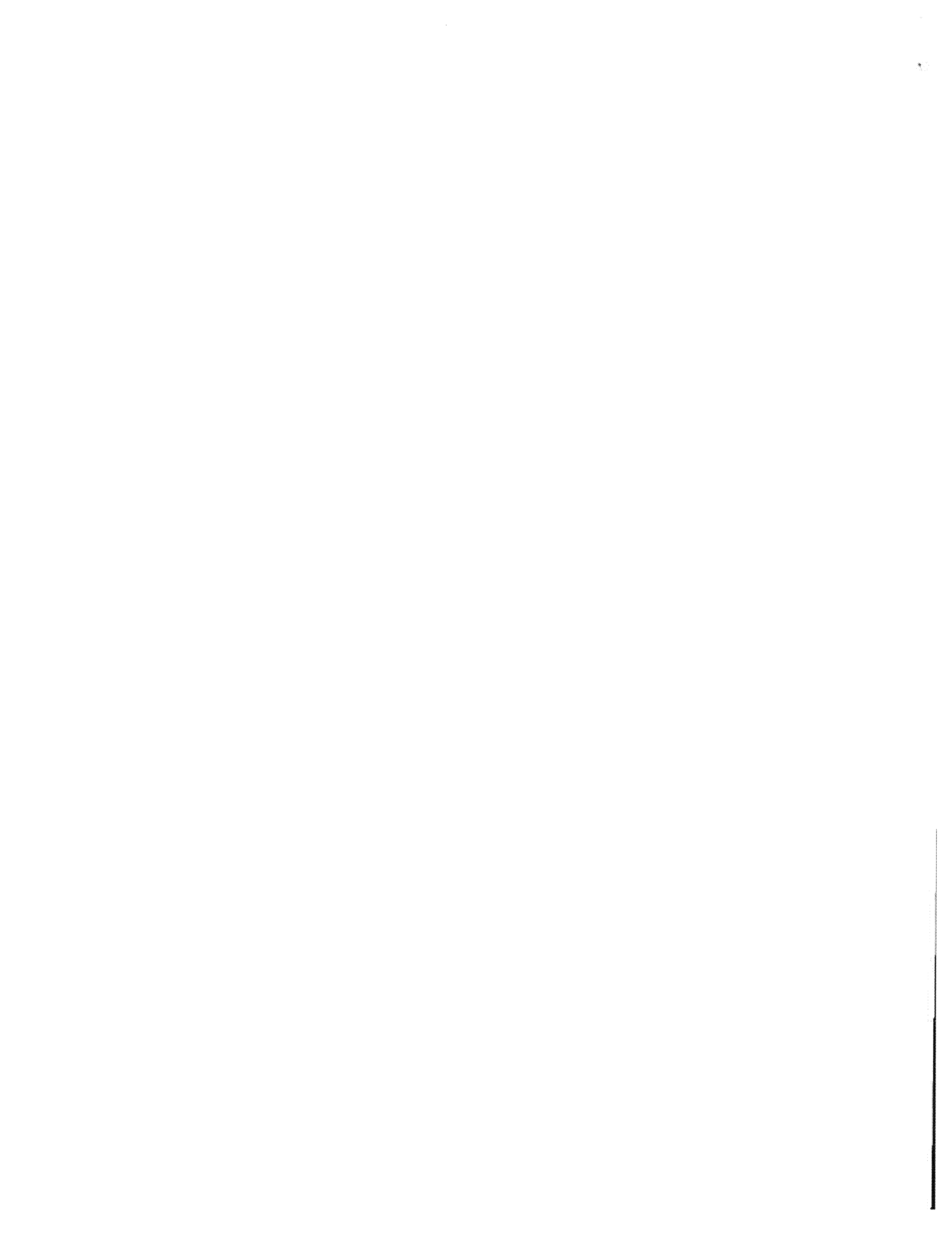
/s/ Dirk McClanahan
Dirk McClanahan (DC Bar No. 1019009)
Zach Miller (DC Bar No.: 1023148)
McClanahan Powers, PLLC
8133 Leesburg Pike, Suite 130
Vienna, Virginia 22182
Tel: (703) 520-1326
zmiller@mcplegal.com
Counsel for Petitioner



CERTIFICATE OF SERVICE

To date, Respondent has not been served or entered an appearance. Undersigned Counsel will provide service as indicated by statute pursuant to Superior Court Rules of Civil Procedure Agency Review Rule 1(a) and as required by the Rules of the Court. Specifically, Petitioner will serve the Office of the Corporation Counsel of the District of Columbia and the D.C. Department of Public Works.

/s/ Dirk McClanahan
Dirk McClanahan



Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0035-12R16
BEVERLY DAY,	)	
Employee	)	
	)	Date of Issuance: July 6, 2016
v.	)	
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge

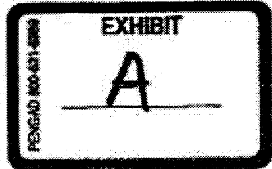
Angela Pringle, Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

Beverly Day ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on November 25, 2011, challenging the Department of Public Works' ("Agency") decision to terminate her from her position as a Staff Assistant. Agency filed its Answer on December 20, 2011. A Prehearing Conference was convened in this matter on November 1, 2013, and the parties subsequently submitted legal briefs addressing the issues in this matter. It was determined that an evidentiary hearing was warranted, which was convened on May 13, 2014, where both parties presented testimonial and documentary evidence. The parties subsequently submitted written closing arguments.

An Initial Decision was issued by the undersigned in this matter on July 7, 2014, reversing Agency's decision to remove Employee from her position as a Staff Assistant. Agency filed a Petition for Review on August 11, 2014, with the OEA Board asserting that the Initial Decision was not based on substantial evidence.



On April 13, 2016, the OEA Board issued an Opinion and Order on Petition for Review remanding this matter to the undersigned to "properly analyze the facts of this case using the actual definitions [of assault] relied upon by Agency."[1]

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and

2. If so, whether the penalty of removal was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The OEA Board issued an Opinion and Order on Petition for Review in this matter, holding that the Initial Decision was not based on substantial evidence, and that the undersigned did not properly consider the definition of assault which Agency relied upon in taking adverse action against Employee.[2] Agency cited to a generic definition of assault as outlined in Black's Law Dictionary, 109 (7th ed. 1999): "Assault is generally defined as the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact, or the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery." Agency also cites to D.C. Code § 22-404 (2001), which provides that an assault occurs when someone "threatens another in a menacing manner," in support of its cause to remove Employee. Agency contends that this is the simplest form of assault and requires nothing more than threatening another in a menacing manner.

In the Initial Decision, an analysis was given based on the definition of assault as set forth by the District of Columbia Court of Appeals in *Stroman v. United States*, 878 A.2d 1241 (D.C. 2005). The Court in *Stroman* held that the elements of criminal assault are as follows: (1) an attempt, with force or violence, to injure another; (2) with the apparent present ability to effect the injury; and (3) with the intent to do the act constituting the assault. The OEA Board found that this was the incorrect definition of assault to analyze the facts of this case and instead remanded this matter to the undersigned to "properly analyze the facts of this case using the actual definitions relied upon by Agency." While the Agency provided two definitions of assault in its Proposed Initial Decision[3], a Black's Law Dictionary definition and the "intent-to-frighten" assault definition codified in D.C. Code § 22-404, the Board does not make clear which definition should be properly analyzed. Given that the Black's Law Definition of assault is not binding in the District of Columbia, one must assume that the proper analysis would derive from

[1] *Day v. D.C. Department of Public Works*, OEA Matter No. 1601-0035-12, Opinion and Order on Petition for Review (April 13, 2016)
[2] *Id. at* 4.
[3] *See* Agency's Proposed Initial Decision (June 27, 2014); *See also* Agency's Petition for Review (August 11, 2014).

D.C. Code § 22-404 (2001), albeit similar to the definition provided in Black's Law Dictionary. As set forth in Agency's Petition for Review, the D.C. Court of Appeals has found that the "intent-to-frighten assault... requires proof that the [Employee] intended either to cause injury or to create apprehension in the victim by engaging in some threatening conduct; an actual battery need not be attempted."[4] Because assault is a general intent crime, there need be no subjective intention to bring about an injury.[5] The assault may be inferred from doing the act that constituted the assault.[6]

Here, the undersigned made a finding in the Initial Decision that Employee placed her belongings on a co-worker's desk and put her hands in a "fighting position" during the confrontation with another fellow co-worker. The undersigned also found that Employee's swinging motion was not an attempt to injure Green; but rather in response to being pulled away from the situation and an attempt to counter the resistance faced by Employee from her fellow co-workers to quell the exchange. However, the OEA Board disagreed with this finding and held that it was not based on substantial evidence.[7] It is apparent that the Board finds that when Employee placed her hands in a "fighting position," that she intended to cause injury or create apprehension in her co-worker, Green, whom she was involved in a heated exchange with, which led to Employee's removal. The Board also considered the testimonial and documentary evidence of eyewitness accounts in concluding that the findings in the Initial Decision were not based on substantial evidence.

According to OEA Rule 633.3, the Board may grant a Petition for Review when the Administrative Judge's ("AJ") decisions are not based on substantial evidence. The Board found that the analysis provided in the Initial Decision which concluded that Employee's swinging motion was an attempt to counter the resistance in response to a co-worker intervening in the heated exchange was not based on substantial evidence in the record. Rather than reverse the findings of the Initial Decision, the Board remanded it back to the undersigned to apply the facts of the case to the definition of assault used by Agency to remove Employee. Ostensibly, the correct definition in which to apply to the facts in this matter is whether Employee intended either to cause injury or to create apprehension in her co-worker by engaging in some threatening conduct. By placing her hands in a "fighting stance" during the heated exchange with her co-worker, the OEA Board made it clear that they find that this action amounts to threatening conduct and created apprehension in Employee's co-worker whom she was involved with in a heated exchange. Furthermore, in its Opinion and Order, the Board states that, "[t]he record is clear that Employee intended to hit Ms. Green."[8]

Accordingly, I must find that Agency had cause to take adverse action against Employee for "any on-duty or employment-related act or omission that an employee knew or should reasonably know is a violation of law: assault or fighting on duty."[9]

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[4] *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986); *See also* Agency's Petition for Review, p. 5-6.
[5] *Lee v. United States.*, 831 A.2d 378 (D.C. 2003).
[6] *Stroman v. United States*, 878 A.2d 1241 (D.C. 2005).
[7] *Day v. D.C. Department of Public Works*, OEA Matter No. 1601-0035-12, Opinion and Order on Petition for Review, p. 4.
[8] *Id.* at 7.
[9] 6-B DCMR §1619.5(c), Table of Appropriate Penalties.

Appropriateness of penalty

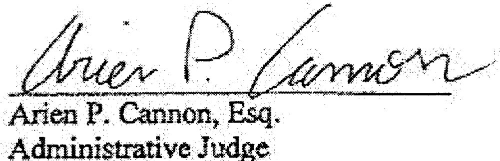
In assessing the appropriateness of the penalty, the Office of Employee Appeals is limited to ensuring that "managerial discretion has been legitimately invoked and properly exercised."[10] When an Agency's charge is upheld, the Office of Employee Appeals has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[11]

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[12] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[13] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[14] Here, the Table of Appropriate Penalties provides that removal is an appropriate penalty for a first time offense of assault. Thus, I find that Agency reasonably concluded that termination was an appropriate penalty under the circumstances.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to remove Employee from her position as a Staff Assistant is **UPHELD**.

FOR THE OFFICE:



Arien P. Cannon, Esq.
Administrative Judge

---

[10] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[11] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).
[12] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[13] *See Id.*
[14] *Id.*

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;
2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;
3. The finding of the presiding official are not based on substantial evidence; or
4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 1100 4th St., SW., Suite 620E, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

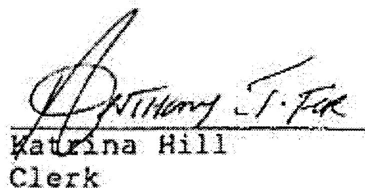
CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION ON REMAND** was sent by regular mail on this day to:

Beverly Day
1912 T Street, SE
Washington, DC 20020

Rahsaan Dickerson, Esq.
Office of the Attorney General
For the District of Columbia
441 4th Street, NW
Suite 1180 N
Washington, DC 20001

Angela Pringle
AFSCME Local 2091
1831 Fenwick Street, NE
Washington, DC 20009



Katrina Hill
Clerk

July 6, 2016
Date

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0035-12
BEVERLY DAY, Employee	
	Date of Issuance: July 7, 2014
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, Agency	
	Arien P. Cannon, Esq. Administrative Judge

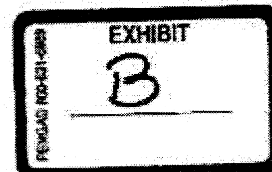
Angela Pringle, Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Beverly Day ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on November 25, 2011, challenging the Department of Public Works' ("Agency") decision to terminate her from her position as a Staff Assistant. Agency filed its Answer on December 20, 2011. This matter was assigned to me on August 9, 2013.

A Prehearing Conference was convened in this matter on November 1, 2013. A Post Prehearing Conference Order was issued on November 4, 2011, which required the parties to submit legal briefs addressing the issues in this matter. Both parties submitted their briefs accordingly. Upon consideration of the briefs, it was determined that there were material issues of facts and an Evidentiary Hearing was warranted. As such, an Evidentiary Hearing was convened on May 13, 2014, where both parties presented testimonial and documentary evidence. The parties were subsequently ordered to submit written closing arguments on or before June 27, 2014. The written closing arguments were submitted accordingly. The record is now closed.



JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and

2. If so, whether the penalty of removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
>> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

UNDISPUTED FACTS

On the morning of July 28, 2011, there was a heated verbal exchange between Employee and her co-worker, Sabrina Green ("Green"). Both employees used profanity during this exchange. It is undisputed that this incident occurred after Ms. Green asked Employee whether Ms. Cassandra Boyd ("Boyd"), an administrator with Agency, was coming to the office that morning. Employee responded by saying that she did not know whether Boyd was coming to the office. This exchange quickly turned into an argument between Employee and Green. This incident occurred in an office space shared by Rosa Grant, Elneta Chance-Hawkins, Sabrina Green, and Tracey Thompson at Agency's 2750 South Capitol Street, Southeast location. Ms. Thompson was not present the morning of the incident. What occurred during the course of this argument is at issue.

On September 12, 2011, Agency issued Employee an Advance Written Notice of Proposed Removal. On October 25, 2011, Agency issued Employee a Notice of Final Decision on Proposed Removal, which terminated Employee from her position for "any on-duty or employment-related act or omission that an employee knew or should reasonably know is a violation of law: assault or fighting on duty." Agency also listed the following as a cause for

Employee's termination: "any on-duty or employment-related reason for corrective or adverse actin that is not arbitrary or capricious; making a false report to the Metropolitan Police Department." However, it was later determined at the Evidentiary Hearing, that this cause was not, in fact, used as one of the causes to remove Employee from her position.

SUMMARY OF TESTIMONY

On May 13, 2014, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Agency's Case in Chief

Rosa Grant ("Grant") Tr. 10-24

Grant testified in relevant part that: she is a Program (Staff) Assistant with Agency's Solid Waste Management Administration ("SWMA") division and has been with Agency for 25 years. Grant further testified that she was at work on the morning of July 28, 2011, and that her tour of duty was from 7:00 a.m. to 3:00 p.m. at Agency's 2750 South Capitol Street, Southeast location. Grant stated that she shared office space with Sabrina Green, Elneta Chance, and Andrea Hedgeman, who were all present the morning of July 28, 2011. Grant also stated that when she came in that morning, all of the other ladies were already in the shared office space. Grant stated that while getting coffee, she observed Employee come to the doorway with food in her hand from McDonald's. Grant then testified that she heard Ms. Green asked Employee if Ms. Boyd was coming to their office on that day, to which Employee responded "I don't know." Subsequently, Employee and Ms. Green began talking back and forth to which Grant did not pay much attention to because she "assum[ed] it [was] not real."[1] Grant testified that she observed Employee place her purse and McDonald's food on Ms. Hedgeman's desk once the exchange escalated. Grant stated that the voices between Employee and Green were getting "strong" and that Employee and Ms. Green were "saying bad words to each other."[2]

After Employee placed her purse and food on Ms. Hedgeman's desk, Employee walked over to Ms. Green's desk with her hands up in a fighting stance. Grant then put her arms around Employee's waist and said, "Ms. Day, come on and go down to your office. Think about your job." Employee responded by saying "Okay, Ms. Grant." Grant stated that she did not remember seeing Green out of her seat during this exchange because Elneta Chance-Hawkins was standing between Employee and Green, and her view was obstructed by Employee's height. Grant further stated that once she grabbed Employee by the waist, she was focusing on trying to hold Employee back and was not sure if Employee was swinging.

---

[1] Tr. at 12.
[2] Tr. at 21.

Andrea Elizabeth Hedgeman ("Hedgeman") Tr. 25-39

Hedgeman testified in relevant part that: she is an employee of Agency's Solid Waste Collection Division as a Program Support Assistant. Hedgeman testified that she was at work on the morning of July 28, 2011, and her tour of duty was 6:45 a.m. to 3:15 p.m. She stated that on the morning of July 28, 2011, Employee came into the shared office space and said good morning to everyone, then inquired if anyone wanted her (Employee) to bring back anything from the 7-Eleven convenience store. Hedgeman asked Employee to bring her some Equal sugar for her coffee. When Employee returned, Hedgeman was working at her computer when she heard a lot of back and forth commotion. Initially, Hedgeman did not think the commotion was serious. During the commotion, Hedgemen testified, that she heard cursing and name calling. Hedgeman stated that she realized the verbal exchange was serious when Employee placed her purse on her (Hedgeman's) desk. After Employee placed her belongings on Hedgeman's desk, Hedgeman stated that she saw Employee throw her hands up in a "fighting position."[3] When Employee's hands were put in a fighting position, Elneta Chance intervened. Hedgeman is not sure if a punch landed, but did testify that she saw Employee throw her hands up. After Employee's hands were thrown up and Elneta Chance intervened, Hedgeman testified that she went outside to the parking lot with her cigarettes. Hedgeman testified that at some point she did see Ms. Green standing up, although she is not exactly sure at what point during the incident Ms. Green stood up. Hedgeman also recalled that after the incident was over, she heard Employee say to Ms. Green, "what time do you get off?" After Ms. Green responded that she got off at 3:00 o'clock, Employee responded, "Well, I'll meet you at that point."[4]

After the incident, Hedgeman stated that she gave a statement regarding her account of the incident and that the only person she discussed her statement with was Daniel Harrison (Investigator to this matter). Hedgeman also stated that she was hesitant to give a statement at first because she had just gotten back to work from a 2010 incident and did not want to be involved in the investigation.

Sabrina Green ("Green") Tr. 39-55

Green testified in relevant part that: she is an employee of Agency in the Solid Waste Management, Solid Waste Collection Division as a Staff Assistant. Green's worksite is located at 2750 South Capitol Street, Southeast. Green stated that she was at work on the morning of July 28, 2011. Her tour of duty began at 6:30 a.m. and she arrived to work a little before 6:30 a.m. Green testified that when Employee came to their office, she (Green) was at her desk. Green further testified that a little after 6:00 a.m., Employee came in and stated she was going to 7-Eleven and asked if anybody wanted her to bring back anything. Approximately 20 minutes later, Employee came back and began talking to co-workers. Green stated that she asked Employee, "is Ms. Boyd coming down for a meeting?" Employee responded "yes," in a very aggressive tone, to which Green responded by saying she "[didn't] want any problems." Green then asked Employee if she knew what time Boyd was coming down for the meeting, to which Employee responded "no."[5]

[3] Tr. at 28.
[4] Tr. at 30.
[5] Tr. at 43-44.

Green described the verbal exchange she had with Employee as a "back and forth with verbal profanity."[6] During the course of the exchange, Green testified that Employee proceeded to place her purse and coffee on Hedgeman's desk and "threw her hands up." Green further testified that Grant grabbed Employee by the waist as Employee went to swing. Green stated that when Employee swung, she hit Hawkins-Chance instead. Green also testified that she was still sitting down when Employee approached her with her hands up and at no point did she stand up as Employee approached her. Green also testified that when Employee was heading in her direction, she was "afraid" and "scared." Green further stated that Grant told Employee, "Come on, Ms. Day, baby, think about your job." Green further stated that Employee responded by saying "okay," but that Employee was still fussing and asked her (Green) what time she got off of work. Green testified that Grant grabbed Employee and Employee swung at her while Chance-Hawkins was in the middle, which caused Employee to hit Chance-Hawkins. Green further stated that Employee continued to talk to her and said, "I see you're not getting up out of that seat," and "what time do you get off?" Green stated that she responded and told Employee that she got off at 3:00 p.m. At this point, Ms. Lashawn Bowden came and took Employee away. Subsequently, Ms Lashawn Bowden came back and took Green outside and told her that she needed to calm down. Green stated that she never threw a punch. This incident led Green to be suspended for five (5) days.

Green also stated that prior to the incident, her only relationship with Employee was "co-workers" and they never had a personal relationship. Green stated that the reason she asked Employee about whether Boyd was coming down for a meeting was because she knew Employee and Boyd were friends.

Elneta Chance-Hawkins ("Chance-Hawkins") Tr. 55-69

Chance-Hawkins testified, in relevant part, that: she is a Sanitation Crew Chief with Agency's Solid Waste Collection Division. Chance-Hawkins also testified that she was working the morning of July 28, 2011. Her tour of duty was 6:45 a.m. to 3:15 p.m., but stated that she always arrived to work at 5:00 a.m.

Chance-Hawkins testified that Employee first came through the office about 6:30 a.m. and spoke and then left the office area and came back about 7:15 a.m. When Employee came back to the office the second time, Chance-Hawkins testified that is when Green asked Employee a question about whether Ms. Boyd was supposed to come to the building and if they were supposed to have an office meeting. During this exchange between Green and Employee, Chance-Hawkins was standing beside Green's desk waiting for Green to print something from her printer. Chance-Hawkins stated that after Green asked Employee a second question, an "explosion" transpired. Chance-Hawkins further stated that all of a sudden there was "a lot of profanity between the two of them back and forth."[7] Chance-Hawkins also stated that she told Green not to move and not to get out of her seat to avoid a possible physical altercation. Chance-Hawkis further testified that Employee put her coffee and purse down and "threw her hands up in the air in a fighting stance."[8] At some point during the verbal exchange, Grant was pulling

[6] Tr. at 45.
[7] Tr. at 59.
[8] *Id.*

Employee away from Green and trying to get her out of the office. Chance-Hawkins testified that while Grant was pulling Employee back, Employee swung and hit her (Chance-Hawkins) in the shoulder area. Chance-Hawkins testified that she did not respond to the swing because she knew it was not directed towards her and that there was not "a lot of power behind [the swing]."[9] Chance-Hawkins further stated that Employee was about five to seven feet away from Green when she swung. Chance-Hawkins stated that she wanted to remain between the two of them to prevent a physical altercation and that at no time did Green get out of her seat.

During the course of the exchange, Chance-Hawkins stated that Employee initially told Green that she got off of work at 4:30 and then asked Green what time she got off and that they could meet in the parking lot after work.

After Ms. Bowden took Employee out of the office, Chance-Hawkins made sure Green was fine and then proceeded to continue working once there were enough people to keep things calm in the office.

Daniel Alonzo Harrison ("Harrison") Tr. 70- 86

Harrison testified, in relevant part, that: he has been a Safety Officer/Risk Manager with Agency since 2004. In this position, Harrison investigates incidents of workplace violence and other major incidents. Harrison described the procedure Agency uses in carrying out an investigation of workplace violence. Initially, Harrison stated, Agency tries to get written statements which are then followed by a sit-down investigation.

In the instant case, Harrison testified that he became aware of the incident on July 28, 2011, through a phone call from Cassandra Boyd. Harrison stated that after he became aware of the incident, he received written statements from witnesses and started interviewing people the next day. Harrison received the names of individuals in the room from Cassandra Boyd and also from the two employees involved in the incident. Harrison testified that the first person he interviewed was Green, who explained her version of the incident. Green stated to Harrison that she and Employee had a conversation about whether or not Ms. Boyd was coming to the office to have a meeting that day. Harrison testified that he also interviewed Employee the day after the incident. Harrison stated that he interviewed all of the witnesses within a week of the incident. None of the employees Harrison spoke with indicated that Leroy Brooks was present in the room at the time of the incident.

After Harrison had spoken with all of the witnesses, he testified that it became clear to him that Employee was the more aggressive party. Harrison further stated that he felt that both individuals were guilty of cursing and calling each other names. Harrison determined that Employee did throw a punch although she did not hit her intended target. Harrison concluded that Green did not throw a punch.

Harrison stated that he did not interview Ms. Bowden because she was not in the room at the time of the incident and did not believe her testimony was relevant during the course of his

---

[9] Tr. at 60.

pulling her away from the situation and Employee's attempt to counter the resistance from Grant or Chance-Hawkins.

Employee testified regarding the events that led up to the heated exchange between herself and Green. Employee stated that she placed her belongings on Hedgeman's desk after she saw Green charging towards her. I did not find Employee's assertion that Green charged towards her to be credible. Employee further stated that Green tried to hit her but was prevented by Chance-Hawkins, who was standing between the two of them. There were a number of inconsistencies in Employee's testimony. For example, at one point Employee testified that Green swung at her, and later she testified that Green did not throw a punch. However, I do not find that the inconsistencies were intended to deceive the undersigned; but rather Employee's attempt to clarify what she perceived to have actually occurred and to skew the facts in her favor.

Employee further testified that to her knowledge, she did not hit Chance-Hawkins during the course of the incident. I find that during the commotion and struggle to keep Employee and Green separated, that Employee may have hit Chance-Hawkins in the shoulder area. However, as stated by Chance-Hawkins, it was not powerful, and thus I do not find that it was intended for Chance-Hawkins, nor was it directed at Green.

Based upon the relevant testimony provided, I am not persuaded that an assault or physical fight occurred. I find that the Agency did not have cause to remove Employee for assault or fighting on duty.

It is noted that the analysis portion of this decision focuses on Agency removing Employee based on the cause of "assault." In *Bonilla v. U.S.*, 894 A.2d 412 (D.C. 2006), the Court noted that the term "fight" has several distinct meaning, including: 1. A confrontation between opposing groups in which each attempts to harm or gain power over the other, as with bodily force or weapons. 2. A quarrel or conflict. 3. a. A physical conflict between two or more individuals. b. Sports. A boxing or wrestling match. 4. A struggle to achieve an objective... 5. The power or inclination to fight; pugnacity...". *The American Heritage Dictionary of the English Language* 679 (3d ed. 1992); *See supra* at Footnote 8. The cause in which Agency relies upon in this case is "assault or fighting on duty." *See* Table of Appropriate Penalties; 6-B DCMR § 1619.1(5)(c). Because the Table of Appropriate Penalties addresses a verbal quarrel or conflict in 6-B DCMR § 1619.1(7) (i.e. arguing and use of abusive or offensive language), it can be reasonably assumed that the cause for "fighting on duty" used by Agency in this case means a physical fight rather than a verbal fight. I do not find that a physical fight occurred here. Thus, I find that Agency also did not have cause to remove Employee for fighting on duty.

Because I have determined that Agency did not have cause to terminate Employee for "any on-duty or employment-related act or omission that an employee knew or should reasonably know is a violation of law, specifically assault or fighting on duty," I will not address the appropriate of the penalty and disparate treatment arguments.

ORDER

Accordingly, it is hereby **ORDERED** that:

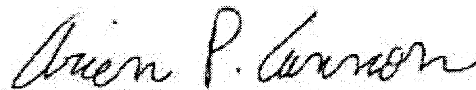
1. Agency's termination of Employee is **REVERSED**;

2. Agency shall reinstate Employee to the same or comparable position she held prior to her termination;

3. Agency shall immediately reimburse Employee all back-pay and benefits lost from her termination; and

4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:



Arien P. Cannon, Esq.
Administrative Judge

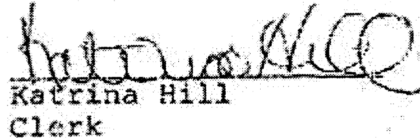
CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail this day to:

Beverly Day
1912 T Street, SE
Washington, DC 20020

Angela Pringle
AFSCME Local 2091
1724 Kalorama Road, NW
Suite 200
Washington, DC 20009

Rahsaan Dickerson, Esq.
Office of the Attorney General
For the District of Columbia
441 4th Street, NW Rm 1180N
Washington, DC 20001



Katrina Hill
Clerk

July 7, 2014
Date

NOTICE OF APPEAL RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the Office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All petitions for review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation or policy;

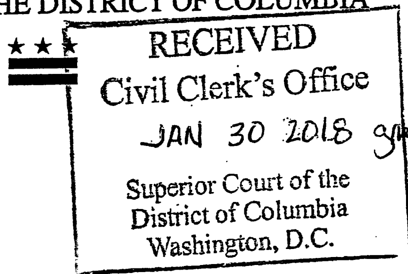
3. The findings of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with the General Counsel's office, D.C. Office of Employee Appeals, 1100 4th St., SW (East Building), Suite 620E, Washington, DC 20024. Three (3) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review must file their response not later than thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

GOVERNMENT OF THE DISTRICT OF COLUMBIA



OFFICE OF EMPLOYEE APPEALS

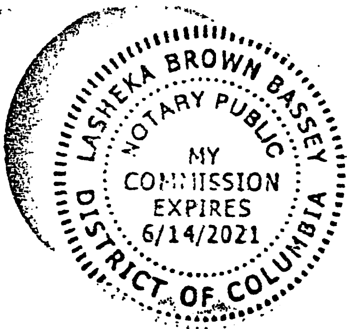
REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BEVERLY DAY, Petitioner, v. DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, Respondent.	Case No. 2016 CA 005498 P(MPA) Judge Todd E. Edelman

CERTIFICATE OF FILING [1]

I hereby certify that this is the true and correct official case file in the matter of *Beverly Day v. District of Columbia Department of Public Works,* OEA Matter No.1601-0035-12R16. The record consists of one volume containing forty-nine (49) tabs.



Wynter Clarke
Wynter Clarke
Paralegal Specialist

District of Columbia: SS
Subscribed and Sworn to before me
this 30th day of January, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

[1] At the request of the Superior Court clerk, this record is refiled because the Court was unable to locate the original filing that was submitted on May 16, 2017.

Filed
D.C. Superior Court
12/05/2017 16:55PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

METROPOLITAN POLICE DEPARTMENT c/o Office of the Attorney General for D.C. 441 Fourth Street, N.W. Suite 1180 North Washington, D.C. 20001 Petitioner, v. GOVERNMENT OF THE DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS 955 L'Enfant Plaza Suite 2500 Washington, D.C. 20024 Respondent.	)

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that the Metropolitan Police Department ("Petitioner" or "Department") appeals to the Superior Court of the District of Columbia from the Opinion and Order on Remand, dated November 7, 2017, and all rulings encompassed therein, issued by the Office of Employee Appeals ("OEA" or "Respondent") in the matter of Paula Edmiston v. Metropolitan Police Department, OEA Matter No.: 1601-0057-07R16. A copy of the November 7, 2017 Opinion and Order on Remand ("Opinion and Order") and the 2nd Initial Decision on Remand ("SIDR") dated December 12, 2016, are attached to this Petition for Review as Attachments 1 and 2 respectively. The Petitioner seeks to have the Opinion and Order reversed and its decision to terminate Paula Edmiston ("Employee") upheld.

Description of Judgment, Order or Decision:

Employee was appointed to the Department in 1984 and on April 1, 2006, she held the rank of captain. On June 2, 2006, Employee was issued a Notice of Proposed Adverse Action ("Proposed Notice") in which she was advised that the Department was proposing to reduce her rank to lieutenant based on acts of misconduct she committed on April 1, 2006. In a Final Notice of Adverse Action ("Final Notice") dated July 23, 2006, Employee was informed that she had been found guilty of committing acts of misconduct and would be reduced to the rank of lieutenant. Employee appealed the Final Notice to the Chief of Police ("COP") who, on August 28, 2006, issued a decision denying Employee's appeal and also proposed the penalty of termination for the misconduct committed by Employee. In the decision of the COP, Employee was informed that she could elect to have an evidentiary hearing where the charges of misconduct would be considered by a three-member panel ("Panel"). Employee elected to have an evidentiary hearing and following the hearing, the Panel issued a decision wherein Employee was found guilty of misconduct. The Panel recommended that Employee be terminated and she was terminated effective March 2, 2007.

Employee appealed her termination to OEA, and on April 30, 2015, an Initial Decision was issued which reversed the Agency's termination action on the ground that the COP did not have the authority to substitute the penalty of termination for demotion because the General Order relied upon by the COP was not in effect when the action against Employee commenced. Ultimately, an appeal to the District of Columbia Superior Court resulted in a decision dated October 9, 2013, that concluded that the General Order relied upon by the COP could be retroactively applied and thus authorized the COP to change the proposed penalty of suspension to termination. Accordingly, the matter was remanded to the OEA for further

proceedings and on August 8, 2014, an Initial Decision on Remand ("IDR") was issued which affirmed Employee's termination.

Employee appealed the IDR to the Superior Court, and on June 8, 2016, the Court issued an Order remanding the matter to OEA for the purpose of determining "whether MPD General Order 12 0.21 supersedes applicable version of 6-B DCMR § 1613.2, which can now be found at 47 D.C. Reg. 7094, § 1613.2." Order at 11. On remand, after the parties submitted briefs, the SIDR was issued which reversed Employee's termination. The Department appealed the SIDR to the OEA Board and on November 7, 2017, the OEA Board issued the Opinion and Order on Remand which affirmed the SIDR. Petitioner contends that the November 7, 2017 Opinion and Order on Remand is contrary to law and should be reversed.

B. <u>Address of Respondent</u>

District of Columbia Office of Employee Appeals

Serve on: Lasheka Brown, Esq.
General Counsel
Office of Employee Appeals
955 L'Enfant Plaza
Suite 2500
Washington, D.C. 20024

C. <u>Names and addresses of all other parties to the agency proceeding:</u>

Petitioner: Metropolitan Police Department
c/o Frank Mc Dougald
Assistant Attorney General
441 Fourth Street, N.W., 1180 North
Washington, D.C. 20001

Employee: Ted J. Williams, Esq.
Counsel for Paula Edmiston
1200 G Street, NW
Suite 800
Washington, D.C. 20005

D. Names and addresses of parties to be served:

Name	Address
1. District of Columbia Office of Employee Appeals	Lasheka Brown, Esq. General Counsel Office of Employee Appeals 955 L'Enfant Plaza Suite 2500 Washington, D.C. 20024
2. Paula Edmiston	Ted J. Williams, Esq. Counsel for Edmiston 1200 G Street, NW Suite 800 Washington, D.C. 20005

E. Copies of the November 7, 2017 Opinion and Order on Remand and the December 12, 2016 Second Initial Decision on Remand are attached to this Petition.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

Nadine C. Wilburn
Chief Counsel and Senior Advisor
Personnel, Labor and Employment Division

/s/ Andrea G. Comentale
ANDREA G. COMENTALE, D.C. Bar # 405073
Chief
Personnel and Labor Relations Section

/s/ Frank Mc Dougald
FRANK MC DOUGALD, D.C. Bar # 213927
Assistant Attorney General
441 4th Street, N.W.
Washington, D.C. 20001
Rm. 1180S
(202) 724-7309 Voice
(202) 347-8922 Facsimile
e-mail: frank.mcdougald@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review of Agency Decision, with attachments, was sent by certified mail, return receipt requested to:

Lasheka Brown, Esq.
General Counsel
Office of Employee Appeals
955 L'Enfant Plaza
Washington, D.C. 20005

Ted J. Williams, Esq.
Counsel for Paula Edmiston
1200 G Street, NW
Suite 800
Washington, D.C. 20005

/s/ Frank Mc Dougald
Frank Mc Dougald
Assistant Attorney General

ATTACHMENT 1

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: PAULA EDMISTON, Employee v. METROPOLITAN POLICE DEPARTMENT, Agency	OEA Matter No.: 1601-0057-07R16 Date of Issuance: November 7, 2017

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Paula Edmiston ("Employee") was a captain with the Metropolitan Police Department ("Agency"). On June 2, 2006, the Assistant Chief of Human Services ("ACHS"), Shannon Cockett, served Employee with a Proposed Notice of Adverse Action and recommended that she be demoted to the rank of lieutenant. Employee was charged with conduct unbecoming of an officer, failure to obey orders, and willfully and knowingly making an untruthful statement. The charges stemmed from two events in 2006, wherein Employee made disrespectful comments to a cashier at a grocery store regarding the cashier's race and national origin. Employee subsequently made disparaging remarks to a male patron at another grocery store pertaining to his sexual orientation. Agency conducted an

administrative review and issued its Final Notice of Adverse Action on July 25, 2006. The notice stated that that Employee was guilty of all three charges based on the preponderance of the evidence. As a result, Employee was demoted to the rank of lieutenant.

Thereafter, Employee appealed her demotion to former Chief of Police, Charles Ramsey. On August 29, 2006, Chief Ramsey denied Employee's appeal and recommended that her punishment be increased from demotion to removal. Employee elected to have the adverse action reviewed by a panel of police officers ("Trial Panel"). The Trial Panel found Employee guilty of all three charges and recommended that she be terminated. Employee appealed the Trial Panel's decision to Acting Chief of Police, Cathy Lanier. However, Employee's appeal was denied on February 23, 2007 and her termination became effective on March 2, 2007.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 7, 2007. Two issues were presented to the Administrative Judge ("AJ") for adjudication: whether Agency commenced its adverse action in a timely manner and whether Agency had the authority to increase the proposed penalty from demotion to removal. The AJ issued his Initial Decision on April 30, 2008. With respect to the timeliness issue, the AJ held that Agency did not violate D.C. Official Code § 5-1031, commonly referred to as the 90-day rule. The rule prohibits adverse actions from commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause.[2] According to the AJ, Chief Ramsey's August 29, 2006 letter to Employee did not trigger the 90-day time period because the notice did not identify itself as a proposed notice of adverse action and did

[1] *Petition for Appeal* (March 7, 2007).
[2] The AJ noted that the statute contains an exception for acts subject to criminal investigations; however there was no pending criminal investigation pending against Employee.

not contain the charges and specifications required of such a notice. Hence, the AJ determined that Agency's June 2, 2006 proposed notice to Employee was well within the 90-day deadline.

With respect to the Chief's authority to increase Employee's proposed penalty, the AJ stated that Employee's "right not to have her proposed penalty increased was impaired by Agency's retroactive use of [the General Order].[3] He further provided the following:

> When the underlying events occurred on April 1, 2006, GO-PER-120-21 was not in place, and the Chief of Police was not authorized to increase punishment. The enactment of the new General Order—if held to apply to the punishment imposed on the Employee—would increase the Employee's liability for past conduct because she would be subject to a removal rather than a mere demotion. Under Landgraf and the District of Columbia administrative agency cases following it, the Employee's punishment cannot be increased by means of the General Order applied retroactively to conduct occurring before its enactment.

Based on the foregoing, the AJ held that Chief Ramsey improperly increased Employee's penalty from demotion to removal. Therefore, he reversed Agency's adverse action and held that the correct remedy was to reinstate Employee's demotion.[4]

Thereafter, Employee filed a Petition for Review with OEA's Board.[5] Her sole argument in the petition was that the AJ "lacked the power to *sua sponte* demote [Employee] without permitting her the opportunity to petition OEA for a de novo evidentiary hearing."[6] In its Opinion and Order on Petition for Review, the Board highlighted OEA Rule 625.1, which

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[3] Effective April 13, 2006, Agency issued General Order ("GO") 120.21, which addresses disciplinary procedures and processes. With regard to adverse action appeals, the GO provided that the Chief of Police or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the Assistant Chief of Human Services.

[4] *Initial Decision* (April 30, 2008).

[5] While Employee's Petition for Review was pending before OEA's Board, Agency filed a Petition for Review in D.C. Superior Court. Agency also filed an Opposition to Employee's June 2, 2008 Petition for Review with OEA on July 17, 2008. However, D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the Board's decision. On July 9, 2009, Agency filed a Motion for Extension of Time to File Petition for Review of Agency Decision. The parties subsequently requested to stay the matter pending before OEA, and subsequently requested that the stay be lifted on August 26, 2009. The request was granted.

[6] *Petition for Review*, p. 8 (June 2, 2008).

provides that a party may request the opportunity for an evidentiary hearing; however, it is within the AJ's discretion to grant such a request. The Board agreed with the AJ's assessment that an evidentiary hearing was not warranted based on the issues presented by the parties. Furthermore, the Board held that the AJ did not abuse his discretion by deciding this matter based solely on the documents of record. As a result, Employee's Petition for Review was denied and the AJ's Initial Decision was upheld.[7]

Agency subsequently filed an appeal with D.C. Superior Court. On October 9, 2013, the Honorable Judge Judith Macaluso issued an Order Reversing Agency Decision, in part. In her analysis, Judge Macaluso, stated that "Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for the Petitioner." Therefore, the matter was remanded to the AJ for reconsideration consistent with the Order.[8]

On August 8, 2014, the AJ issued his Initial Decision on Remand. He reiterated his previous finding that Agency did not violate the 90-day rule. However, the AJ reversed his original decision with respect to Agency's ability to increase a proposed penalty and concluded that it did not abuse its discretion by terminating Employee.[9] Consequently, Agency's termination action was upheld.

Employee appealed the Initial Decision on Remand to D.C. Superior Court on September 9, 2015, wherein she asserted that the AJ's decision should be reversed because the GO that the Chief of Police relied upon in imposing a higher penalty was superseded by D.C. Municipal Regulation ("DCMR") § 1613.2. In its June 8, 2016 Order, the Court discussed three issues:

[7] *Opinion and Order on Petition for Review* (January 25, 2010). The Board also denied Agency's Motion for Extension of Time to File Petition for Review of Agency Decision because it failed to file its petition within the thirty-five day deadline as required by D.C. Official Code § 1-606.03(c).
[8] *District of Columbia Metropolitan Police Department v. Office of Employee Appeals*, 2008 CA 004804 P(MPA) (D.C. Super. Ct. 2013).
[9] *Initial Decision on Remand* (August 8, 2014).

whether the argument raised by Employee in her petition regarding DCMR § 1613.2 was being raised for the first time; whether the law of the case doctrine prohibited the Court from making a determination with respect to the aforementioned issue; and whether DCMR § 1613.2 prohibited the Chief of Police from increasing Employee's penalty. In its analysis, the Court provided that Employee's argument was properly preserved for appeal. It further stated that the law of the case doctrine was inapplicable in this matter. Regarding the last issue, the Court agreed with Employee's contention that the AJ did not properly analyze whether Agency's GO could supersede a municipal regulation. Therefore, the matter was remanded to the AJ "in order for OEA to make a determination as to whether MPD General Order 120.21 supersedes [the] applicable version of 6-B DCMR § 1613.2...."[10]

Thereafter, the parties were ordered to address the issue identified in the Court's June 8, 2016 Order.[11] In its Remand Brief, Agency argued that its action of reducing Employee's rank to lieutenant was done so in accordance with GO 120.21 and that it did not violate DCMR § 1613.2. It further stated that the Chief of Police "in denying Employee's appeal, did not increase the penalty. Instead the [Chief] 'remand[ed] the case for an alternative process,' a trial board and recommendation of termination." Agency further questioned the applicability of DCMR § 1613.2 to the instant matter because it believed that Chief Ramsey was the appeals official, not the deciding official. In addition, it posited that the language contained in § 1613.2 and GO 120.21 was "congruent and harmonious in allowing a matter to be remanded for further consideration." As a result, Agency reiterated its position that Employee's termination was appropriate.[12]

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[10] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) (D.C. Super. Ct. 2014).
[11] *Post-Conference Briefing Order* (November 9, 2016).
[12] *Agency's Brief Following Remand from the District of Columbia Superior Court* (November 10, 2016). *Also See Agency's Reply to Employee's Brief on Remand in Response to the Superior Court Decision* (December 2, 2016).

In response, Employee contended that the Chief of Police lacked the authority to amend the Assistant Chief of Police's findings and increase the penalty. According to Employee, Agency's General Orders are merely internal guidelines that do not supersede District regulations. She further stated that the Chief of Police was limited to promulgating orders which are consistent with District law. Consequently, Employee requested that Agency's termination action be reversed.[13]

The AJ issued his Second Initial Decision on Remand on December 12, 2016. He disagreed with Agency's argument that DCMR § 1613.2 and GO 120.21 were congruent because Chief Ramsey was not the deciding official as envisioned by the regulations. According to the AJ, while Chief Ramsey remanded the matter for a hearing before the Trial Panel, it was Chief Lanier who ultimately acted as a deciding official in this case. He further stated that it was evident that § 1613.2 and GO 120.21 contained conflicting language and that an agency's internal orders cannot override municipal regulations. Thus, in response to Superior Court's Order, the AJ concluded that Chief Lanier, acting as the ultimate decision maker, was legally prohibited from increasing the proposed penalty levied against Employee from demotion to termination. As a result, the AJ determined that the imposed penalty of termination was an abuse of discretion and that there was substantial evidence in the record to support the penalty of demotion. Consequently, Agency's termination action was reversed and Employee was ordered to be reinstated and demoted to the rank of lieutenant.[14]

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[13] *Employee's Brief on Remand in Response to the Superior Court's Decision* (November 14, 2016). Employee subsequently filed a Reply Brief to Agency's November 10, 2016 submission, wherein she argued that Agency's brief was non-responsive to the question presented by D.C. Superior Court in its Remand Order. In addition, Employee restated her position that MPD's General Order was inconsistent with DCMR § 1613.2. *Employee's Reply Brief* (December 1, 2016).

[14] *Second Initial Decision on Remand* (December 12, 2016).

Agency filed a Petition for Review with OEA's Board on January 17, 2017. It insists that the Second Initial Decision on Remand was based on an erroneous interpretation of DCMR § 1613.2 because the evidence shows that neither Chief Ramsey nor Chief Lanier increased the penalty of termination. According to Agency, the penalty of termination was recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett. Agency does not dispute that statutes and regulations override internal general orders. However, it argues that regulations and statutes supersede internal general orders only to the extent that the specific provision is in conflict with the regulation. Thus, Agency believes that Chief Ramsey acted in accordance with GO 120.21(VI)(L)(4) when he remanded Employee's case for an alternative process and that the subsection he relied upon does not conflict with § 1613.2. Consequently, it opines that Employee's termination was proper and requests that the Petition for Review be granted.[15]

In response, Employee submits that Agency's Remand Brief and Petition for Review are not responsive to the question presented by D.C. Superior Court. Employee states that Agency's arguments go beyond the purview of the specific order to be addressed on remand. She further argues that Agency's attempts to make semantical distinctions regarding Chief Ramsey's actions are "meaningless" because Judge Okun has already concluded that Ramsey increased Employee's penalty. Moreover, Employee reiterates her argument that the Chief of Police is the deciding official for every Agency disciplinary action. As a result, she contends that the language contained in GO 120.21 directly conflicts with DCMR § 1613.2 and that the maximum penalty Agency could impose was a demotion. Therefore, Employee asks this Board to deny Agency's Petition for Review.

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[15] *Agency's Petition for Review* (January 17, 2017).

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

D.C. Superior Court's Instructions on Remand

In his June 8, 2016, Order, the Honorable Judge Robert Okun remanded this matter to the AJ to specifically address the following question: "[d]id District of Columbia Regulation § 1613.2 prohibit *Chief Ramsey* from increasing Petitioner's penalty?" (emphasis added). According to Judge Okun, the AJ failed to address the issue of whether Agency's GO was superseded by the relevant DCMR regulation. He went on to state that "[t]he court finds nothing in the administrative record or the IDR to suggest that 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."[16] As such, Agency's argument that the penalty of termination was actually recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett, is non responsive to the question presented on remand because it exceeds the purview of Judge Okun's instructions. Accordingly, D.C. Superior Court has already determined that the

[16] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) at 11.

Chief of Police acted as the final decision maker in this case. Therefore, we must determine if the AJ's findings regarding the conflict between GO 120.21 and DCMR § 1613.2 are supported by substantial evidence and if they were based on an erroneous interpretation of statute or regulation.[17]

General Order 120.21 and D.C. Municipal Regulation § 1613.2

At the time Employee committed the misconduct, Agency's GO 1201.1 was the current internal order in place. GO 1201.1 authorized the Chief of Police to sustain a proposed penalty, reduce it, or remand the matter for further consideration. Under 1201.1, the penalty imposed could not be increased from the penalty originally proposed. On April 13, 2006, less than two weeks after the alleged acts occurred, but before Agency issued its final notice to Employee, GO 120.21 was enacted to replace its predecessor.[18] GO 120.21(VI) states the following in part:

> H. Notice of Proposed Adverse Action.
>
> (1) The Assistant Chief…shall issue a Notice of Proposed Adverse Action. The member shall be given an opportunity to respond to the notice, in writing, within fifteen (15) business days, and the Assistant Chief, OHS, shall consider the member's response before rendering a written decision.
>
> (2) The Notice of Proposed Adverse Action issued by the Assistant Chief…shall include:
> a. Charges

[17] It important to distinguish between a proposing official and a deciding official. In *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998), the D.C. Court of Appeals sought to clearly define the term "penalty proposed" within the parameters of § 1614.4, a previous, but similar, version of § 1613.2. The Court deferred to OEA's interpretation of the term, holding that the penalty proposed refers to the initial penalty suggested by the proposing official, not the recommendation of the assigned disinterested designee. In Agency's June 2, 2006 Notice of Proposed Adverse Action, Assistant Chief of Police, Shannon Cockett, recommended that Employee be demoted to the rank of lieutenant. Thus, the proposing official in this case was Assistant Chief Cockett, not the Trial Panel, as Agency suggests. In contrast, DCMR § 1699 defines the term deciding official as the individual who issues a final decision on a disciplinary action in accordance with § 1623. Moreover, Agency's own GO 120.21 IV(A) states that "[t]he Chief of Police is the designated final authority with respect to discipline." Part B further provides that the "Chief of Police shall *review and decide* all appeals of disciplinary actions. The decision of the Chief of Police, or his/her designee, any appeals of Corrective Actions shall be the final administrative review of these actions."

[18] In D.C. Superior Court's first Order Reversing Agency Decision, Judge Macaluso determined that the Chief of Police correctly applied GO 120.21 to Employee's case because that was the internal regulation that was in place at the time she filed her appeal.

b. Specifications(s)
c. The proposed action; and
d. A copy of the investigative report

L. Adverse Action Appeals

> (4) When an appeal is made, the appropriate papers shall be forwarded to the Chief of Police, who 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.
>
> (5) The Chief of Police *may impose a higher penalty than recommended* by the Hearing Tribunal, *or the Assistant Chief, OHS.* (emphasis added)

In contrast, Chapter 16 of the District of Columbia Regulations (formally 47 D.C. Reg. 7094 (September 1, 2000)) limits a deciding official to the following:

Duties and Responsibilities of the Proposing Official: General Discipline

> 1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.
>
> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> 1613.2 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.* (emphasis added).

Accordingly, under GO 120.21, the Chief of Police is permitted to impose a higher penalty than was recommended by the proposing official. Conversely, under DCMR § 1613.2, the deciding official is prohibited from increasing the penalty recommended by the proposing official. As a general rule, statutes and regulations take precedence over an agency's internal procedures. In *Nunnally v. D.C. Metropolitan Police Department*, 80 A.3d 1004 (D.C. 2013), the

D.C. Court of Appeals held that an MPD General Order "essentially serves the purpose of an internal operating manual," and "do[es] not have the force or effect of a statute or an administrative regulation…"[19] Moreover, in *Flores v. Metropolitan Police Department*, OEA Matter No. 1601-0131-11, *Opinion and Order on Petition for Review* (March 29, 2016), this Board held that Agency's General Order 120.21 is an internal guideline that is superseded by a conflicting municipal regulation.

Based on the foregoing, this Board finds that the AJ correctly determined that DCMR § 1613.2 supersedes Agency's internal operating procedure, GO 120.21. After Employee appealed the proposing official's recommendation of demotion, the Chief of Police was permitted to sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice. Instead, former Chief Ramsey issued a letter on August 29, 2006 in response to Employee's proposed demotion in which he both denied her appeal and increased the penalty to termination. Chief Ramsey further designated the letter as the "final Agency action in this matter." As such, Chief Ramsey impermissibly increased the proposed penalty in violation of § 1613.2. There is no language in GO 120.21 which grants the Chief of Police the authority to act in a way that is prohibited by the municipal regulations of the District of Columbia. Therefore, the AJ correctly held that Agency erred in imposing the penalty of termination. Accordingly, the Initial Decision is based on substantial evidence and was not an erroneous interpretation of statute or regulation. Consequently, Agency's Petition for Review must be denied.

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[19] *Id.* (Quoting *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C.1990)). *See also District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).

ORDER

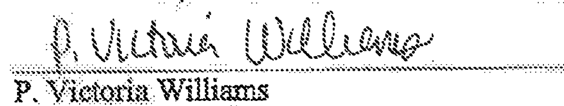
Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED.**

FOR THE BOARD:

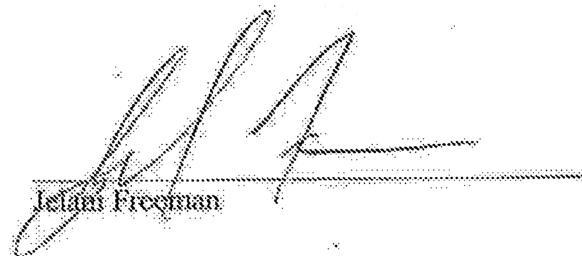
Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson



P. Victoria Williams



Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

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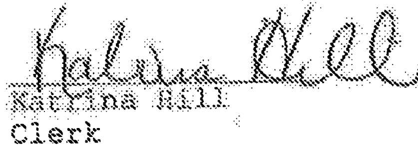

Katrina Hill
Clerk

November 7, 2017
Date

ATTACHMENT 2