4813 South Dakota Avenue, NE
Washington, DC 20017
February 6, 2018

Sheila Barfield, Esq.
Executive Director
District of Columbia Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20014

Dear Ms. Barfield:

Enclosed is the Petition for Review filed at the District of Columbia Superior Court. I am enclosing the original Initial Decision issued by Judge Joseph Lim which included Notice of Appeal Rights.

Thank you.

Sincerely,

Linda C. Sun

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Linda Sun
4813 South Dakota Ave. NE, Washington DC 20017
Petitioner

v.

Case Number 17-000745-MPA

DC Office of the Tenant Advocate:
2000 14th St. NW, Suite 300 North, Washington, DC 20009
Respondent

PETITION FOR REVIEW OF AGENCY DECISION
(per Appendix to SCR Agency Review 1)

A. Notice is hereby given that Linda Sun appeals to the Superior Court of the District of Columbia from the Initial Decision (ID) of the Office of Employee Appeals issued on the 13th day of October, 2017. A copy of the ID is attached to this petition.

Description of the ID: Initial Decision on the issues of 1) whether OEA has jurisdiction over Employee's untimely appeal and 2) whether this appeal should be dismissed.

Concise statement of the agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner:

After reviewing the record, Senior Administrative Judge Joseph E. Lim, Esq. determined that there were no material issues of fact that would require an evidentiary hearing. The record closed. Judge Lim found that I had established OEA's jurisdiction over my appeal because the Office of the Tenant Advocate (OTA), respondent, failed to provide me with any information on my OEA appeal rights at termination. Secondly,

Judge Lim determined I have had all my claims adjudicated on their merits in federal court and the appeal must be dismissed on the grounds of *res judicata* and collateral estoppel due to the federal court's supplemental jurisdiction.

I am seeking a *de novo* review of the OEA dismissal. The United States District Court for the District of Columbia held I was an at-will employee. The United States Court of Appeals for the District of Columbia ruled I was not an at-will employee. I was a Career Service employee under the Comprehensive Merit Personnel Act (CMPA), entitled to due process rights.

CMPA has stipulated that for DC Government employees jurisdiction over state law claims is governed by the CMPA. OEA itself has ruled that whistleblower claims may be included in any relevant whistleblower violations as part of an OEA matter. *In the Matter of Jeffrey McInnis v. Department of Parks and Recreation,* OEA Matter No.: 1601-0138-15, page 7.

As to the nature of relief, I am seeking back pay and a reinstatement to my former or equivalent position.

B. Address of Respondent Agency: OTA, 2000 14th Street, NW, Suite 300 North, Washington, DC 20009

C. Names and addresses of all other parties to the agency proceeding:

Johanna Shreve, Director, OTA, 2000 14th Street, NW, Suite 300 North, Washington, DC 20009;

Dennis Taylor, Esq., Supervisory Attorney Advisor, OTA, 2000 14th Street, NW, Suite 300 North, Washington, DC 20009.

D. Name and address of attorney to be served:

Andrea G. Comentale, Esq., Section Chief, Personnel and Labor Relations Section, DC Office of the Attorney General, 441 Fourth St. N.W. Suite 1180N, Washington, D.C. 20001-2714.

E. A copy of the Initial Decision sought to be reviewed is attached to this petition.

F. Linda Sun, petitioner, *pro se*, 4813 South Dakota Avenue, NE, Washington, DC 20017-2728. (For communication purposes, from December 2 to December 30, 2017 I will be traveling and will not have access to U.S. Mail or to a telephone. I can be reached via email only.)

(202) 636-3958
lcsun8@yahoo.com

Date: November 3, 2017

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Linda Sun,	)	OEA Matter No. 1601-0037-17
Employee	)	
	)	Date of Issuance: October 13, 2017
v.	)	
	)	Joseph E. Lim, Esq.
Office of the Tenant Advocate,	)	Senior Administrative Judge
Agency	)	

Andrea Comentale, Esq., Agency Representative
Linda Sun, Employee *pro se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 7, 2017, Linda Sun ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the Office of the Tenant Advocate's ("OTA" or "Agency") final decision to remove her from her position as a Program Support Specialist effective on February 21, 2012.

I was assigned this matter on June 5, 2017, after Agency submitted its Answer to Employee's Appeal on May 12, 2017, with a motion arguing that OEA lacked jurisdiction over this matter. On June 6, 2017, I issued an order directing Employee to submit a brief addressing whether her appeal should be dismissed for lack of jurisdiction. Employee submitted her response, not just to the jurisdiction issue, but also to the substantive issues of her appeal. After reviewing the record, I determined that there were no material issues of fact that would require an evidentiary hearing. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether this Office has jurisdiction over Employee's untimely appeal.
2. Whether this appeal should be dismissed.

FINDINGS OF FACT[1]

1. Employee started in the real estate business in 1985.

2. The OTA was formerly a division of the DC Department of Consumer and Regulatory Affairs (DCRA). OTA became independent of that agency on October 1, 2007. It is classified as a subordinate agency in the District government under the administrative control of the Mayor. The OTA works with other entities to promote better tenant protection laws and policies in the District.

3. Employee was hired as a Program Support Specialist with the Agency effective September 17, 2007, in position DS-301-11/4, pursuant to a Career Service appointment.

4. From September 2008 until the date Employee was summarily removed, Employee's immediate supervisor was Dennis Taylor (Taylor), Agency's General Counsel.

5. Employee was never hired by Agency as a lawyer.

6. Between August 2009 and May 2011, Taylor conducted repeated trainings regarding the unauthorized practice of law that included instructions on actions that constituted unauthorized practice of law, advice on how to avoid the unauthorized practice of law, and instructions on specific actions to avoid.

7. Later, Taylor asked Employee to delete the designation "JD" from her Agency email signature block after observing that it caused confusion among Agency's clients.

8. On March 31, 2010, Agency issued OTA Bulletin No. 2010-001 that restricted all staff in Employee's position from mediation activity and attendance at Office of Administrative Hearings (OAH) and court hearings.

9. In 2010, Agency internally designated Program Support Specialists as "Case Management Specialists," but their status as a Career Service employee remained unchanged.

10. In December 2010, Employee unilaterally resumed the use of the designation "JD" in her Agency email signature block.

11. Employee is a law school graduate but is not a member of the District of Columbia Bar and is not admitted to practice law in any jurisdiction.

12. On December 14, 2010, Employee sent several emails to a tenant client of Agency regarding an upcoming OAH mediation in the tenant's case stating, "I will send you an email with a proposal for the amount you want to ask from the landlord. You can then send it directly to [the landlord's attorney], with a cc to me. He will respond to you as to

[1] Based on the parties' joint statement of facts, unrefuted representations, and documents of record.

what the LL will offer. You can then forward this email to me with your comments. I will then give you my response. This may go back and forth a few times until both parties agree on the amount to settle. . . . I have worked like this on a couple of mediation cases . . .."

13. In emails dated January 20, 2011, and January 25, 2011, Employee again offered her assistance to the Agency client in negotiations. She further counseled the tenant client extensively on how to handle the mediation and stated, "I will be on standby tomorrow morning, either by phone or by email."

14. On January 26, 2011, Employee emailed a letter that she had drafted for the tenant client for filing in Superior Court, offering to file the letter upon approval by the tenant client.

15. On February 3, 2011, Employee advised the tenant client via email to violate a provision of a settlement agreement that had been reached in the tenant's case, stating, "[d]on't dismiss the tenant petition."

16. On February 8, 2011, Employee continued to advise the tenant client via email by stating "On second thought I think you need not cancel the motion to dismiss" but later stating " ...if you like, you can cancel the motion to dismiss."

17. On February 8, 2011, Employee called Taylor "stupid" when discussing the tenant client's case.

18. On February 10, 2011, Employee informed the tenant client via email that she had called Taylor "stupid" in connection with the tenant's case.

19. Employee continued to advise this tenant client via email on February 10, 2011, by providing legal language to include in a motion to withdraw the motion to dismiss, and also advising the tenant to fire the Agency attorney assigned to the case.

20. In late 2011 or early 2012, Employee's request for annual leave for February 24, 27, 28 and 29, 2012, for the purpose of taking the Bar exam was approved.

21. On February 11, 2012, Employee sent an email to Taylor, copying the Agency Director, Johanna Shreve, stating, among other things, "I will be taking off the week of 20 to 24."

22. In emails dated February 14, 2012, Agency's Director notified Employee that 5 hours of sick leave was approved for February 21, 2012 but that any additional leave was denied based on the needs of the Agency.

23. On February 17, 2012, Employee sent several emails concerning her request for additional leave to Taylor, copying the Agency Director and the Mayor, that contained the following language: ". . . – oh, stupid me – you suggested that I should most respectfully submit my petition to our esteemed chief tenant advocate, who has graciously granted my petition for 5 hours. . . . — oh, there I go again, how stupid of me

– I entreated the Honorable Chief Tenant Advocate to grant my Motion for 8 Hours Leave of Absence for Thursday, February 23, 2012. Whew! That was close. I almost got my head cut off."

24. On February 21, 2012, Agency issued a Summary Removal Directive (Notification) informing Employee that she was being summarily removed from her position of Program Support Specialist, Grade 11, Step 6 effective February 21, 2012.

25. Employee's Notice of Summary Removal Directive did not provide Employee with a copy of the OEA Rules, the OEA appeal form, and notice of the right to be represented by a lawyer or other representative, or any information regarding her appeal rights.

26. On February 24, 2012, Agency issued a Summary Removal Notice in accordance with section 1616 of Chapter 16 of the District of Columbia Personnel Regulations, listing the following causes for removal:

- Count One – Misfeasance and Insubordination: Copying the Executive Office of the Mayor with Your Disrespect of Supervisors
- Count Two – Malfeasance by Unauthorized Practice of Law: Preparation of Legal Documents
- Count Three – Malfeasance by Unauthorized Practice of Law: Unauthorized Drafting of Legal Documents
- Count Four – Malfeasance by Unauthorized Practice of Law and Insubordination by Violation of OTA Bulletin No. 2010-001: Participation in Mediation Conducted by the Office of Administrative Hearings
- Count Five - Malfeasance by Unauthorized Practice of Law: Provision of Legal Advice and Preparation of Legal Documents
- Count Six - Malfeasance by Unauthorized Practice of Law: Advising a Tenant to Fire an OTA Attorney
- Count Seven – Insubordination: Disobeying a Direct Order from Your Supervisor
- Count Eight – Malfeasance: Boasting to a Member of the Public of Your Disrespect of a Superior
- Count Nine – Unauthorized Practice of Law and Insubordination: Use of Degree Designation "JD" in Email Signature Block
- Count Ten – Insubordination: Disobeying Repeated Direct Orders to Avoid Practice of Law.

27. On March 21, 2012, Employee filed a Charge of Discrimination against Agency with the Equal Employment Opportunity Commission (EEOC) alleging she was terminated as a result of discrimination based on race, sex, national origin, age and retaliation.

28. On July 17, 2012, at Employee's request, the EEOC issued a Notice informing Employee of the right to institute a civil action under Title VII of the Civil Rights Act of 1964.

29. On or about October 22, 2012, Employee filed a Complaint in the United States District Court for the District of Columbia against the District of Columbia, Agency's Director and Taylor in both their official and individual capacities.

30. On or about November 28, 2012, Employee filed a Second Amended Complaint with seven causes of action:

- Count I – Wrongful Termination in Violation of Public Policy
- Count II – Retaliation in Violation of the District of Columbia Whistleblower Protection Act
- Count III – Discrimination in Violation of the District of Columbia Human Rights Act
- Count IV – Wrongful Termination in Violation of Title VII of the Civil Rights Act of 1964
- Count V – Breach of Contract
- Count VI – Intentional Infliction of Emotional Distress
- Count VII – Assault

31. On September 30, 2015, the United States District Court denied Employee's Motion for Summary Judgment and granted Defendants' Motion for Summary Judgment on Counts I through VI of the Second Amended Complaint.[2]

32. On March 15, 2016, following a jury trial, the U.S. District Court entered a Judgment on the Verdict for Defendant on Count VII – Assault of the Second Amended Complaint.[3]

33. Employee appealed the verdict on March 18, 2016.

34. On February 14, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued a Judgment affirming the US District Court's orders filed September 20, 2015, and March 15, 2016, stating that summary judgment was proper on Employee's Title VII, 42 U.S.C. §1981, D.C. Human Rights Act, District of Columbia Whistleblower Protection Act, and intentional infliction of emotional distress claims. The Court further noted that because Employee was not at-will, the common law claim of wrongful termination in violation of public policy is unavailable and the District of Columbia Comprehensive Merit Personnel Act provides Employee's sole remedy.

35. On April 7, 2017, Employee filed the instant appeal to the Office of Employee Appeals asserting that "[t]he termination of [her] employment was retaliatory and in violation of the public policy of the DC Government."

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[2] *Sun v. D.C. Government, et al.*, Civ. Action No. 12-1919, 133 F.Supp.3d 155 (2015).

[3] *Sun v. Shreve*, Civ. Action No. 12-1919, 2016 WL 2840476 (D.D.C.)(March 15, 2016).

36. Agency's Omnibus Response: Motions to Dismiss for Lack of Jurisdiction, and on the Grounds of *Res Judicata* and Collateral Estoppel, and, in the Alternative, for Summary Disposition, and, in the Alternative, Answer was filed on May 12, 2017.

ANALYSIS, AND CONCLUSIONS OF LAW

1. Whether this Office has jurisdiction over Employee's untimely appeal.

This Office's jurisdiction is established pursuant to the District of Columbia's Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code § 1-601-01, *et seq.* (2001). OEA Rule 628.2 states that "*[t]he employee shall have the burden of proof as to issues of jurisdiction...*"[4] Pursuant to OEA Rule 628.1, the burden of proof is defined under a "preponderance of the evidence" standard. Preponderance of the evidence means "[t]hat 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 604.2 provides that an appeal with this Office must be filed *within thirty (30) calendar days of the effective date of the appealed agency decision.*[5] This Office has no authority to review issues beyond its jurisdiction. The time limits for filing appeals with administrative adjudicative agencies are mandatory and jurisdictional matters. *See Zollicoffer v. District of Columbia Pub. Sch.*, 735 A.2d 944 (D.C. 1999) (quoting *District of Columbia Pub. Emp. Relations Bd. v. District of Columbia Metro. Police Dep't*, 593 A.2d 641, 643 (D.C. 1991)). A failure to file a notice of appeal within the required time period divests this Office of jurisdiction to consider the appeal. *See Id.*

However, OEA Rule 605.1 provides that:

When an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with a written copy of all of the following:

(a) The employee's right to appeal to the Office;

(b) The rules of the Office;

(c) The appeal form of the Office;

(d) Notice of applicable rights to appeal under a negotiated review procedure; and

(e) Notice of the right to representation by a lawyer or other representative authorized by the rules.

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[4] 59 DCR 2129 (March 16, 2012).

[5] *Id.*

Employee was removed from her position on February 21, 2012, and filed her appeal with OEA more than five years later on April 7, 2017. However, Employee alleges, and Agency concedes, that the February 21, 2012, Notice of Summary Removal Directive failed to provide Employee with a copy of OEA Rules, the OEA appeal form, and notice of the right to be represented by a lawyer or other representative, or any information regarding her appeal rights. The Superior Court of the District of Columbia has also held that even if an employee received a copy of his or her appeal rights, such notice fails if the notice is ambiguous.[6] Consequently, Agency cannot benefit from Employee's seemingly untimely filed Petition for Appeal because it failed to adhere to OEA Rule 605.1.[7] Accordingly, I find that Employee has established the jurisdiction of this Office over her appeal.

2. Whether this appeal should be dismissed.

Agency argues that this appeal should be dismissed on the grounds of *Res Judicata* and Collateral Estoppel. *Res Judicata*, Latin for "a thing adjudicated," is defined by Black's Law Dictionary[8] as, "an issue that has been definitively settled by judicial decision," and as "an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit." "Collateral Estoppel" is defined by the same Black's Law Dictionary as "the binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based;" and "a doctrine barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one."

Agency points out that there are no material and genuine issues of fact for OEA to decide, as all of the same claims against all of the same parties that Employee raises in this appeal were already adjudicated on their merits in Federal Court. In *Sun v. & District of Columbia,* 133 F. Supp. 3d 155 (D.D.C. 2015) (Agency Exhibit #15), *aff'd,* No. 16-7032 (D.C. Cir. Feb. 14, 2017) (per curiam), Employee instituted a civil action pursuing the same allegations that she is attempting to raise in this matter against the District, and any District employee, supervisor, or official having personal involvement in the prohibited personnel action. Employee brought seven causes of action:

(1) Wrongful Termination in Violation of Public Policy;

(2) Retaliation in Violation of the District of Columbia Whistleblower Protection Act;

(3) Discrimination in Violation of the District of Columbia Human Rights Act;

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[6] See *Curry-Mills v. D.C. Dept. of Youth & Rehabilitation Services*, Case No. 2016 CA 003190 P(MPA) (D.C. Super. Ct. December 22, 2016).

[7] See *Margaret Rebello v. DCPS*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008).

[8] 8th Edition 1999.

(4) Wrongful Termination in Violation of Title VII of the Civil Rights Act of 1964, as Amended;

(5) Breach of Contract;

(6) Intentional Infliction of Emotional Distress; and

(7) Assault.

The action was adjudicated in Federal Court, which has supplemental jurisdiction under 28 U.S.C. § 1367. As noted in the Findings of Facts above, the U.S. District Court for the District of Columbia, on September 30, 2015, denied Employee's Motion for Summary Judgment and granted the defendants' (Agency, et. al.) Motion for Summary Judgment in part and denied in part.[9]

In *Sun v. D.C. Government, et al.*, the U.S. District Court for the District of Columbia ruled that Employee failed to prove discriminatory bias in the determination to terminate her, holding that her argument is illogical and unsupported by the evidence in the record. Thus, the Court granted summary judgment to defendants on the Title VII claim and the D.C. Human Rights Act claim, Intentional infliction of emotional distress, and the whistleblower claim. The Court also ruled that there was no breach of contract because Employee was terminated for cause. With regard to the wrongful termination claim, however, the Court wrongly held she was "at will." (The parties subsequently agreed that Employee was Career Service and therefore not an at-will employee.) Lastly, with regard to the assault claim, the Court ruled that it was for the jury to decide, not the Court. Subsequently, the jury in *Sun v. Shreve* threw out Employee's assault claim.[10]

On April 7, 2017, Employee filed a Petition for Appeal with OEA contesting Agency's final decision to remove her from her position as a Program Support Specialist, effective on February 21, 2012. Her stated grounds for appeal are 1) summary removal; 2) conflicts of interest of her superiors, Ms. Shreve and Dennis Taylor; 3) discrimination; 4) insufficient evidence; 5) EEOC complaint; 6) due process; 7) retaliation; and 8) preclusion from filing earlier.

Employee argues that *res judicata* and collateral estoppel do not apply in her case since the Federal Court had wrongly held that she was an at-will employee. She claims that she did not get a full and fair opportunity to litigate her claims, thus depriving her of due process. However, the record belies that assertion. I note that this argument is moot as the Federal Court had adjudicated all her claims on their merits and thus afforded her all the same procedural rights as any Career Service employee would have, even holding a jury trial for her assault claim. The parties in Employee's claims, Agency and Employee, are also the parties here. Thus, the doctrines of *res judicata* and collateral estoppel preclude her appeal.

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[9] *See Sun v. District of Columbia,* 133 F. Supp. 3d 155, 172 (D.D.C. 2015) (Agency Exhibit #15), *aff'd,* No. 16-7032 (D.C. Cir. Feb 14, 2017) (per curiam) (Agency Exhibit #12).

[10] Civ. Action No. 12-1919, 2016 WL 2840476 (D.D.C.)(March 15, 2016)

In addition, D.C. Code § 1-615.56(a) clearly and unequivocally precludes her appeal to this Office. D.C. Code § 1-615.56(a) states:

> The institution of a civil action pursuant to [D.C. Code] § 1-615.54 shall *preclude* an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals ... (emphasis added).

In the instant matter, Employee has had all her claims adjudicated on their merits. Thus, her appeal must be dismissed.

ORDER

It is hereby ORDERED that Employee's Petition for Appeal is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

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, 955 L'Enfant Plaza Suite 2500, 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** was sent by regular mail on this day to:

Linda Sun
4813 South Dakota Avenue, NE
Washington, DC 20017

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

October 13, 2017
Date

Rule 1. Superior Court Review of Agency Orders Pursuant to D.C. Code 1981, Title 1, Chapter 6

(a) Time and manner of filing application. Unless a different time is prescribed by statute an appeal to the Superior Court of the District of Columbia permitted by the Act, shall be obtained by filing a petition for review with the Clerk of the Civil Division, within 30 days after service of formal notice of the final decision to be reviewed or within 30 days after the decision to be reviewed becomes a final decision under applicable statute or agency rules, whichever is later. The petition shall show service, in accordance with Civil Rule 5, upon all other parties to the agency proceeding and the Office of the Corporation Counsel of the District of Columbia. The Clerk shall designate the petition as a miscellaneous action and affix the suffix "MPA" after the number assigned to the case. A nonrefundable fee as prescribed in Civil Rule 202 shall accompany the filing of the petition. If two or more persons are entitled to petition for review of the same order or decision and their interests are such as to make joinder practicable, they may file a joint petition and proceed as a single petitioner.

(b) Stay. A motion for stay of the agency's decision or order pending direct review in this Court may be filed with the Clerk. The motion shall show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. A copy of the order or decision sought to be stayed shall be appended to the motion unless the agency record has previously been filed with the Court. The Court, upon such conditions as may seem to be required and to the extent necessary to prevent irreparable injury, may take appropriate and necessary action to preserve the status or rights of a petitioner or other party pending conclusion of the review proceedings. The Court may require a party seeking a stay of the decision or order on appeal in this Court to post a supersedeas bond on such conditions, in such amount, and with such sureties as the Court deems necessary.

(c) Intervention. A party to the proceeding before the agency who desires to intervene in this Court shall serve upon all parties to the proceeding and file with the Clerk 1 copy of a notice of intention to intervene, whereupon such party shall be deemed an intervenor without the necessity of filing a motion. Any other person who desires to intervene shall file a motion containing a concise statement of the interests of the moving party and the grounds upon which Intervention is sought. The notice of intention or motion for leave to intervene shall be filed within 30 days after the date on which the petition for review is filed unless such time is extended by order of the Court for good cause shown.

(d) Content of petition for review; answer. The petition for review shall contain the information called for in the "Petition for Review of Agency Decision" form available from the Clerk, including the names of all the petitioners seeking review, and all the respondents, together with a concise statement of the agency proceedings, the decision sought to be reviewed, and the nature of the relief requested. In addition, a copy of the agency order or decision sought to be reviewed shall accompany the petition.

(e) Procedure following application. Within sixty (60) days from the date of service of petition upon the agency and the office of the Corporation Counsel, the agency shall certify and file with the Clerk the entire agency record, including all of the original papers comprising that record, and shall notify the petitioner of the date on which the record is

filed. The pages of the agency record shall be numbered sequentially and the documents included listed in an index. At the expiration of thirty (30) days after the filing of the record, or the time the record is due to be filed, whichever shall occur first, it shall be set down for a scheduling and settlement conference and certified by the Clerk to the judge assigned to review the case. The Court, for good cause shown, may shorten or extend the time above prescribed. If the case is not settled, the judge assigned to review the case shall then establish a briefing schedule for the parties. Briefs shall conform to the requirements of Civil Rule 12-I(e) and shall include specific references to the pages of the agency record that support the averments relied upon by the parties.
(f) [Deleted].
(g) Determination of appeal, standard of review. This Court shall base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law.
(h) Incorporation of certain civil rules. Except where inconsistent with D.C. Code 1981, Title 1, Chapter 6 or with this Rule, the following Superior Court Rules of Civil Procedure shall apply to proceedings under this Rule: SCR Civ 5 (Service and filing of pleadings and other papers); SCR Civ 5-I (Proof of service); SCR Civ 6 (Time); SCR Civ 7-I (Stipulations); SCR Civ 10 (Form of pleadings); SCR Civ 10-I (Pleadings: Stationery and locational information); SCR Civ 11 (Signing of pleadings); SCR Civ 54-II (Waiver of costs); SCR Civ 63-I (Bias or prejudice of a judge); and SCR Civ 101 (Appearance and withdrawal of attorneys).

COMMENT

Paragraph (d) has been amended to make plain that a petition for review of an agency decision is not analogous to a brief but to a notice of appeal, and to ease the burden on petitioner who, under the current practice, must file the equivalent of a full-fledged brief before the record itself is filed. The petition need only contain the names of the parties, designate the precise agency order to be reviewed, and indicate briefly what the agency proceeding concerned and the nature of the order from which judicial review is sought. A copy of the agency order is to accompany the petition. The petition must be served on the agency involved with a copy to the attorney in the office of the Corporation Counsel handling the case. The agency then has 60 days (a reasonable period that corresponds to current actual practice) during which it will gather together the original record, number the pages, list each of the included documents in an index and then certify the record to the Clerk. When the record is filed the case will be calendared for scheduling and settlement conference before the judge assigned to review the agency decision. If the case cannot be settled, that judge will establish a briefing schedule for the parties. In their briefs, the parties shall designate the page or pages in the agency record where rulings complained of or evidence referred to appear. The Court will then have before it for decision a record and briefs similar to that presented to the Court of Appeals in "contested cases" from administrative agencies.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Review has been sent by United States Mail, postage paid, this 6th day of February, 2018 to:

Ryan Donaldson, Assistant Attorney General
c/o Andrea Comentale, Esq.
Section Chief
DC Office of the Attorney General
Personnel and Labor Relations Section
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Date: February 6, 2018

Linda C. Sun
4813 South Dakota Avenue, NE
Washington, DC 20017
202-636-3958
lcsun8@yahoo.com

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

Linda Sun, Petitioner v. D.C. Office of Tenant Advocate, Respondent.	Case No. 2017 CA 007451 P(MPA) Judge John M. Mott

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Linda Sun v. D.C. Office of Tenant Advocate,* OEA Matter No. 1601-0037-17. The record consists of two (2) volumes containing nineteen (19) tabs.

Sommer Murphy
Deputy General Counsel

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 18th day of May, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

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

DC DEPARTMENT ON DISABILITY SERVICES
Vs. C.A. No. 2018 CA 002192 P(MPA)
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

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 JOHN M CAMPBELL
Date: April 3, 2018
Initial Conference: 9:30 am, Friday, June 29, 2018
Location: Courtroom 519
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

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

D.C. DEPARTMENT ON DISABILITY SERVICES
c/o Office of the Attorney General for the
District of Columbia
441 4th Street, NW, Suite 1180 North
Washington, DC 20001

Petitioner,

v.

THE DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Respondent.

No. 2018 CA 002192 P(MPA)

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that the District of Columbia Department on Disability Services (hereinafter, "DDS" or "Petitioner") appeals to the Superior Court of the District of Columbia from the Initial Decision of the District of Columbia Office of Employee Appeals (hereinafter, "OEA" or "Respondent") dated February 21, 2018, and all rulings encompassed therein, in the matter of Charis Toney v. D.C. Department on Disability Services, OEA Matter No. 1601-0053-16. A copy of OEA's Initial Decision is attached to this Petition as Exhibit 1. The Petitioner seeks to have the Initial Decision reversed, in part, and the final agency decision to suspend Charis Toney ("Employee") for a total of thirty (30) days for cause upheld.

On March 7, 2016, Petitioner issued a fifteen (15) day written advance notice of a proposal to suspend Employee for a total of thirty (30) days from her position as a VR Specialist based on three (3) charges of misconduct. On May 5, 2016, Petitioner issued the Final Decision

on the Proposed Suspension of 30 Days, sustaining the proposed two (2), fifteen (15) day suspensions, effective May 31, 2016, for the two (2) untruthful statement charges.

Employee filed a timely appeal to the OEA on June 8, 2016. Following the submission of two (2) sets of briefs addressing several issues, an evidentiary hearing was held on October 17, 2017. The Administrative Judge (AJ) issued an Initial Decision dated February 21, 2018, upholding Petitioner's action of suspending Employee for fifteen (15) days for Charge 2 but reversing the suspension of fifteen (15) days for Charge 1 and ordering restoration of back pay and benefits lost as a result of that suspension. In that regard, the AJ found that Petitioner did not establish cause with regard to Charge 1. It is from that decision that this appeal is being made.

B. Address of Respondent Agency:

District of Columbia Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Serve on: Lasheka Brown Bassey, Esq.
General Counsel
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

C. Names and Addresses of All Other Parties to the Agency Proceeding:

Agency: D.C. Department on Disability Services
c/o Andrea G. Comentale, Esq.
Assistant Attorney General
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Employee: Charis Toney
7701 Starshine Drive
District Heights, Maryland 20747

D. Names and Addresses of Parties or Attorneys to be Served:

	Name	Address
1.	Office of Employee Appeals (Respondent)	Lasheka Brown Bassey, Esquire General Counsel 955 L'Enfant Plaza, SW, Suite 2500 Washington, DC 20024
2.	Charis Toney	7701 Starshine Drive District Heights, Maryland 20747
3.	Darnise Henry Bush	2703 Shipley Terrace, SE, #4 Washington, DC 20020

Date: March 28, 2018

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, # 405073
Chief, Personnel & Labor Relations Section
441 4th Street, NW, Suite 1180N
Washington, DC 20001
Ph.: (202) 724-5564
Fax: (202) 741-8872
E-mail: andrea.comentale@dc.gov

CERTIFICATE OF SERVICE

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

Lasheka Brown Bassey, Esquire
General Counsel
Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Charis Toney
7701 Starshine Drive
District Heights, Maryland 20747

Darnise Henry Bush
2703 Shipley Terrace, SE, #4
Washington, DC 20020

/s/ Andrea G. Comentale
Andrea G. Comentale
Assistant Attorney General

EXHIBIT 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
CHARIS TONEY, Employee	
v.	OEA Matter No. 1601-0053-16
D.C. DEPARTMENT ON DISABILITY SERVICES, Agency	Date of Issuance: February 21, 2018 Michelle R. Harris, Esq. Administrative Judge

Darnise Henry Bush, Employee Representative
Mark D. Back, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 8, 2016, Charis Toney ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department on Disability Services ("Agency" or "DDS") decision to suspend her from service for a total of thirty (30) days[1]. On July 8, 2016, Agency filed its Answer to Employee's Petition for Appeal.

Following a failed attempt at mediation, I was assigned this matter on September 7, 2016. On September 16, 2016, I issued an Order Convening a Prehearing Conference to be scheduled for November 8, 2016. However, upon review of that date and determining it was Election Day; the undersigned issued a subsequent Order on October 12, 2016, rescheduling the Prehearing Conference for November 16, 2016. Both parties were present for the Prehearing Conference on November 16, 2016. Following that conference, on November 18, 2016, I issued a Post Prehearing Conference Order requiring the parties to submit briefs addressing whether Agency had cause to take adverse action against Employee and whether the 30-day suspension was appropriate under the circumstances. Agency's brief was due on or before December 16, 2016, and Employee's brief was due on or before January 17, 2017. Briefs were submitted in accordance with the prescribed deadlines.

Following a review of the briefs, I issued an Order scheduling a Status/Prehearing Conference for March 13, 2017. Following the Status/Prehearing Conference on March 13, 2017, I

[1] Two fifteen-day suspensions were levied against Employee and were served consecutively.

issued a Post Status/Prehearing Conference Order requiring parties to address additional issues in supplemental briefs. Agency's supplemental brief was due on or before March 27, 2017, and Employee's brief was due on or before April 10, 2017. Both parties submitted their respective briefs. Based on the review of the supplemental briefs, the undersigned determined that an Evidentiary Hearing was warranted in this matter. As a result, I issued an Order on June 8, 2017, scheduling a Status Conference for June 28, 2017 for the purposes of scheduling an Evidentiary Hearing.[2] Following the status conference, on June 30, 2017, I issued an Order Convening an Evidentiary Hearing in this matter for Tuesday, October 17, 2017. The Evidentiary Hearing was held on October 17, 2017, where both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on November 1, 2017, requiring both parties to submit their written closing arguments on or before December 1, 2017. Both parties submitted their written closing arguments by the prescribed deadline. The record is now closed.

JURISDICTION

The 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 two fifteen (15) day suspensions were appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

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.

[2] On June 19, 2017, Agency filed a Motion to reschedule the June 28, 2017 status hearing. I issued an Order on June 19, 2017 granting Agency's Motion and rescheduled the Status Conference to June 27, 2017.

SUMMARY OF TESTIMONY

On October 17, 2017, 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 Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-Chief

Rachel Phillips ("Phillips") *Tr. 42-114*

Rachel Phillips ("Phillips") worked for the Department of Disability Services ("Agency") as a Human Resources and Benefits specialist. She was responsible for processing employee benefits and was the Family Medical Leave Act ("FMLA") and Paid Family Leave ("PFL") coordinator.

Phillips testified that the Paid Family Leave ("PFL") Act was provided by Agency and offered to its employees. She explained that if an employee requested PFL, they could receive up to three hundred and twenty hours (320) of leave, which equates to eight (8) weeks of paid benefits. However, FMLA was unpaid and employees were required to use their own annual or sick leave because it was due to their own medical conditions. Phillips indicated that PFL is used when an employee is taking care of a family member, a birth of a child, adoption or foster care.

Phillips testified that when Employee requested leave, she indicated on the form that the care was for her mother. She stated that Employee filled out the forms on November 2, 2015, and requested to receive paid leave of one hundred and sixty (160) hours.

Initially, Phillips processed the request as a PFL because she thought it was for the care of Employee's family member. In addition, the document that Employee filled out indicated that she would be providing care for her mother, Karen B. Toney. Phillips stated that Employee provided her birth certificate as proof of relationship to her mother. After reviewing the medical documents signed by Dr. Sarhan, Phillips testified that she then realized that Employee was not caring for her mother, and that Employee was the person having surgery.

Phillips testified that Employee contacted her via email on November 6, 2015, asking for an update regarding her request. Phillips was out of the office the day Employee sent the email, but she contacted Employee the day that she returned to the office. Phillips stated that in her November 9, 2015 email, she informed Employee that she anticipated having her request processed by the end of the week. Phillips testified that Employee emailed her back stating that she was having surgery the next day. Phillips stated that she processed the PFL form so that Employee's request would go through.

Phillips explained that the medical form stated that Employee would be incapacitated from November 10, 2015 to December 10, 2015. The documentation stated that Employee could return to light duty on December 1, 2015. Phillips testified that, the note stated that Employee could come back to regular duty on December 10, 2015. However, Employee came back to work on December 8, 2015, and submitted a return to work note to Phillips.

Phillips stated that she relied on the documentation that she received to approve Employee for PFL, but since she did not qualify for that type of leave, Employee needed to submit a request for

FMLA. Employee subsequently filled out the FMLA paperwork and Phillips approved the letter on November 12, 2015. She stated that Employee indicated on her application that she used sixty (60) hours of annual leave and sixty (60) hours of sick leave.

On February 2, 2016, Phillips stated that Agency received a return to work notice that was signed by Dr. Rifka and dated November 30, 2015, indicating that Employee could be excused from work from November 15, 2015 to December 1, 2015. After further review of the document, Phillips testified that it appeared that there were other changes in the documentation that Employee previously provided to Agency. At this time, Phillips indicated that she thought that the documentation was altered and requested a copy from the practice/office where Employee was treated. Phillips stated she received a fax on February 9, 2016, from the office, and that she and her supervisor, Gria Hernandez ("Hernandez"), compared that the documentation with that previously submitted by Employee. Phillips testified that they discovered that Employee had redacted some of the documentation about her medical condition and diagnosis.

On cross-examination, Phillips stated that when she processed Employee's FMLA she had only worked for Agency for two (2) months. She testified that she most likely helped Employee complete the necessary application form. She attested that she emailed Employee the forms needed to submit her leave request. Phillips testified that the PFL and FMLA were the same application forms. She explained that while she could not recall if Employee expressed to her that she did not know how to fill out the forms, she would have assisted her in completing the forms.. Phillips was unsure if Employee referred to PFL as Personal Family Leave.

Phillips stated that when Employee initially submitted the form, she marked the box that said that she was caring for a family member. Subsequently, it was discovered that Employee was not caring for a family member, so Phillips marked through it with a pink line. Phillips confirmed that Employee did not state that she needed surgery. She stated that the information that was put on the original PFL form was not the same information that went on the FMLA form. Phillips admitted that she told Employee to make a change in the leave category because she was having the surgery. Phillips explained that she asked Employee to submit her birth certificate to prove her relationship to her mother because at the time, Employee submitted a request for PFL. The FMLA was approved via a letter dated November 12, 2015. Phillips explained that it was approved after Employee's surgery on November 10, 2015, because she did not receive all documentation back prior to Employee taking leave for surgery. She did not recall what information that was missing in order to process the FMLA.

On redirect, Phillips stated that Agency had five (5) business days to process PFL or FMLA requests. She explained that four (4) business days transpired from November 2, 2015 and November 6, 2015, and explained that November 9, 2015, was the fifth business day. On November 9, 2015, Phillips contacted Employee to inform her that there was a discrepancy with her form. That was when Phillips received the revised and completed application for FMLA. She stated that the letter was approved on November 12, 2015. Phillips also testified that November 11, 2015, was Veteran's Day, a legal holiday; so she submitted and approved within two (2) days of receiving Employee's completed application.

Gria Hernandez ("Hernandez") *Tr. 116-205*

Gria Hernandez ("Hernandez") testified that she has worked as a Human Capital Administrator with Agency since January 2, 2012. Hernandez was responsible for all facets of Human Resources ("HR") benefits, labor relations, employee relations, and training. She stated that

she was the final authorizer for PFL and FMLA requests. Hernandez explained that Phillips was the HR specialist in her division, and received the applications for PFL, FMLA, and Americans with Disabilities Act ("ADA"). She stated that Phillips verified and validated the applications and presented it to her with the record. Hernandez affirmed that she worked closely with Phillips and that she reviewed and signed off on the applications that were presented to her. Hernandez stated that the application forms could be found in their office or, if requested, emailed by Phillips.

Hernandez explained that PFL was a form of FMLA, but the benefit of PFL was to allow employees of the District of Columbia to care for a loved one with a chronic illness or to spend time with a newly placed foster or adopted child. She stated that an employee was entitled to receive up to three hundred and twenty (320) hours of paid leave.

Hernandez testified that she does not automatically process applications that come in for PFL or FMLA. She testified that if someone requested PFL for the birth of a child, Agency might submit the application in June, but the child may not be due until October, so there would be some time lapse in the processing of the request. She explained that once the application was verified and deemed valid, it was Phillips' responsibility to send the required forms to payroll. Payroll would subsequently load up to three hundred twenty hours onto the employee's leave bank on PeopleSoft.

Hernandez testified that after reviewing Employee's application, it was not clear to her if Employee was providing care for her mother, or if she was going to be on leave for her own health conditions. Hernandez explained that Phillips asked her to review Employee's application. Hernandez indicated that the answers given on the PFL form were from a fertility clinic. Hernandez stated that she asked Phillips if she was sure that the application was for Employee's mother or for herself. Hernandez testified that she had Phillips contact the doctor's office to confirm. The doctor's office informed Agency that Employee was receiving care and that it was not her mother. Hernandez indicated that there was email correspondence exchanged between her, Employee, and Phillips with regard to the documentation. Hernandez stated that Employee indicated in the November 6, 2015 email to Phillips that she was having surgery. Hernandez testified that she told Employee that she could not use PFL for herself.

On the form dated November 9, 2015, Employee requested time off from November 10 through December 10, 2015, for a personal health condition. She requested the use of sixty (60) hours of annual leave and sixty (60) hours of sick leave. Hernandez stated that she allowed the November 2, 2015 PFL Form to be approved because Agency did not want to cause its employees a hard time, especially if they were going through a serious health condition. She explained that if they were able to be flexible, they would work with the employee because the PFL and FMLA were essentially the same form and questions. Further, Hernandez stated that Employee indicated on the form and in her email that she was having surgery on November 10, 2015.

Hernandez confirmed that the FMLA application was approved on November 12, 2015. She stated that it was approved within two (2) business days and stated that Agency generally has seven (7) business days to approve an application. She testified that the approval letter stated that Employee was required to provide a return to work note. Hernandez stated that Employee returned to work on December 8, 2015. Hernandez testified that when the return to work note was brought to her, it was clear that it was a copy and not an original note. Hernandez noticed that the number "eight" was written in pen. Hernandez asked Phillips to contact the doctor's office to confirm that the note came from their office.

Hernandez testified that Phillips contacted the doctor's office to speak with Dr. Sarhan, but she was unavailable. Hernandez indicated that when they reviewed the notice, she saw Dr. Rifka's name and realized that Drs. Rifka and Sarhan were part of the same practice. On February 10, 2016, Hernandez received a copy of the return to work notice from Dr. Rifka that stated that Employee was under his professional care and excused her from duty from November 10, 2015 through December 1, 2015. Hernandez indicated that the notice stated that Employee was to return to light duty on December 1, 2015 and regular duty on December 15, 2015. Hernandez testified that the documentation previously received from the doctor's office did not match this documentation that Employee submitted.

Hernandez indicated that upon review, she prepared a supervisory record citing Employee's abuse of FMLA and for altering the forms. Hernandez testified that on the first page, there was language that had been redacted (white out) regarding Employee's medical diagnosis. She also stated that on page two of the form that Employee submitted, that it stated that she would be out from November 10, 2015 through December 10, 2015. However, the form that was faxed over by the doctor's office stated that she would be out from November 10, 2015 until November 17, 2015.

Hernandez explained that the approved FMLA form indicated that Employee was granted leave from November 10, 2015 to December 10, 2015. She stated that Agency relied on the certification from the doctor that Employee provided to them. Hernandez stated that at the time of Employee's submission, she did not believe that the forms had been altered. Further, Hernandez explained that "no" was circled for the question asking if Employee required care on an intermittent or regular basis. However, the documentation that Employee provided clearly depicted a markup of the word "no." Hernandez posited that the word "no" had been changed to "yes". Hernandez testified that on February 10, 2016, she received a copy of the return to work notice from Dr. Rifka. That form stated that Employee was under Dr. Rifka's professional care and that she was excused from working from November 10, 2015 through December 1, 2015. The form also indicated that Employee was to return to light duty on December 1, 2015, and resume to regular duty on December 15, 2015.

Hernandez stated that she also scheduled a meeting with Employee regarding the forms. Hernandez testified that during the investigation, Employee and her representative were recorded during an interview that was held on February 10, 2016.

(*The recording was played during Hernandez's testimony. The following reflects a summary of the events from the February 10, 2016, recorded interview).* On the recording, Hernandez stated her name and asked Employee and her representative, Darnise Henry-Bush, to identify themselves. Hernandez informed them that the purpose of the investigation was to discuss the documentation submitted for FMLA. In addition, Jessica Gray, Legal Relations Specialist at the Department on Disability Services, was present. During the investigation, Employee stated that she knew that FMLA was Family Medical Leave Act. Employee also stated that she requested FMLA at the end of October because she had a scheduled surgery. Employee submitted her forms to the HR department. Employee told Hernandez that there was an error because Phillips assumed that the request was for her mother, but it was for Employee. Further, Employee explained to Hernandez that there was a miscommunication because when Phillips contacted her doctor, Phillips asked the office for information regarding her mother, and not her. Employee stated during the investigation/interview that she filled out the FMLA form and her doctor completed his portion. Employee recalled filling out the document that was a certification of a health care provider for family member's serious health condition.

On the recording of the interview, Hernandez explained that Employee stated her name and indicated on the form that she was providing care for her mother. Employee told Hernandez that she did not understand the form and thought that because she was having surgery, the form asked her to provide an emergency contact. Thus, Employee provided her mother's contact information because she would be providing care for Employee after surgery. Employee stated that she did not know who checked the box that said she was caring for a family member because she knew that she was the one having the surgery and not caring for a family member.

During the interview with Hernandez, Employee acknowledged that she requested one hundred and sixty (160) hours of leave for November 10, 2015 through December 10, 2015. Subsequently, Employee spoke with Phillips because she found out that her leave was not approved. Philips asked Employee if her mother was having surgery and Employee told her that she was having surgery. Phillips informed Employee that she would have to use her own annual and sick leave. Employee explained that she emailed Phillips a note from her doctor that she was returning to work early on December 7, 2015.

During the same interview, Hernandez went over two forms with Employee, one form was typed and the other was handwritten. Employee acknowledged that the forms were the same, but that some of the information was missing off of the form that she submitted. She explained that her doctor allowed her to whiteout the personal details of her medical condition. Further, she explained that she altered her return to work date from December 1, 2015 to December 8, 2015 because she was not well enough to return to work and received verbal consent from her doctor to alter the date on the return to work form. Employee also stated on the recording that she did not alter the forms that were sent to her doctor by Phillips. While Employee altered her return to work document, she stated that she did not alter the document other than her personal diagnosis while she was out on FMLA. *(End of Summary of Recorded Interview)*

After the interview, Hernandez testified that she contacted Employee's doctor. She explained that she had to contact two offices because although both doctors were in the same practice, they were in different offices. Dr. Sarhan's office completed the FMLA form and informed Hernandez that they do not give patients permission to alter documents. Hernandez indicated that when they contacted Dr. Rifka's office, they did not indicate that they gave Employee permission to change the form. The office informed Hernandez that they would fax over the documents that they had on file for Employee.

Hernandez testified that Agency charged Employee with adverse action that proposed a thirty (30) day suspension. She stated that Employee received the March 7, 2016, advanced notice of proposed thirty-day suspension and confirmed that she was the proposing official, and that Ms. Bonsack was the deciding official. Hernandez explained that Ms. Bonsack did not sustain all three causes because she dismissed the Absent without Official Leave ("AWOL") charge. Hernandez stated that she applied the February 2016 revised District Personnel Manual ("DPM") in applying Employee's discipline because of the newly-adopted Table of Penalties[3]. Further, she explained that if Employee was reviewed under the old DPM, the penalties would have been greater and she would have proposed termination.

On cross-examination, Hernandez opined that Employee lied because of her demeanor. She explained that Employee looked surprised when she pointed out the difference between the faxed documents that Agency received from Dr. Sarhan's office and what was previously submitted by

[3] The newly adopted table is called the "Table of Illustrative Actions."

Employee. Further, Employee continued to look at her representative Ms. Henry-Bush for help answering the questions and asked for a break to speak with her representative privately. Hernandez testified that it was Employee's responsibility to fill out her portion of the FMLA form. She stated that she made sure that Phillips explained what FMLA was when there was confusion with PFL.

Deborah Bonsak ("Bonsack") *Tr. 207-220*

Deborah Bonsack ("Bonsack") worked as the Deputy Director for Administration for Agency. She was also Hernandez's supervisor. Bonsack testified that she was the deciding official in Employee's case. She issued and signed the advance notice of proposed discipline. Before signing the May 5, 2016 Final Decision, Bonsack considered the attachments that were provided as part of the investigation.

Bonsack testified that based upon her review of Employee's return to work notice that extended Employee's leave until December 8, 2015, Bonsack decided that she would not sustain the AWOL charge. However, she sustained the two allegations of false statements because it was determined that Employee falsified information on an official record. She explained that Employee's conduct constituted a serious offense because she was entrusted with the distribution and decisions regarding training, vocational rehabilitation and future funding. Bonsack stated that it was essential to be able to trust Employee, and that falsifying any type of official documents caused concern regarding Employee's trustworthiness.

Bonsack indicated that she did not recall if the 2012 Table of Penalties or the February 2016 Table of Illustrative Actions were used in selecting Employee's penalty. She did list out the *Douglas Factors* in order to determine what the penalty would be. Bonsack testified that after reviewing the factors, although termination was an option, she believed that suspension was a reasonable disciplinary measure under the circumstances. Bonsack stated that she believed that a thirty (30) day suspension was severe enough to get Employee's attention and correct the behavior so it would not occur again.

On cross-examination, Bonsack testified that she based her decision on the false statements that were made by Employee and deemed falsifying documents to be a serious offense.

Employee's Case-In-Chief

Dr. Safa Rifka ("Dr. Rifka") *Tr. 12-39*

Dr. Safa Rifka ("Rifka") is a physician at Columbia Fertility Associates. He testified that he provided medical care to Charis Toney ("Employee") and gave verbal consent/permission for her to redact her personal diagnosis from the Family Medical Leave Act ("FMLA") form in relation to her procedure and to alter the return to work form. He confirmed that Karen Toney was not his patient.

On cross-examination, Dr. Rifka stated that he filled out the FMLA form. Dr. Rifka further stated that he wrote the original note excusing Employee from work from November 10, 2015 through December 8, 2015. He explained that Dr. Sarhan, his partner in the practice and Employee's surgeon, provided the return to work notice because it was customary for the surgeon to do so. While Dr. Rifka did not provide the return to work notice, he stated that it was not unusual for the original physician to also provide a return to work notice.

Dr. Rifka testified that he could not recall the exact date that he gave Employee verbal permission to alter the document that he signed which certified her time out of work as a result of her

side effects from the surgery. Dr. Rifka explained that on November 30, 2015, he indicated that Employee was able to return to light duty work on December 1, 2015, and released Employee to perform regular activity on December 15, 2015. Dr. Rifka testified that the type of surgery Employee underwent required between two (2) to four (4) weeks of recovery. He explained that after November 30, 2015, Employee asked him to extend her time from December 1, 2015 to December 8, 2015, due to ongoing issues from the surgery. Dr. Rifka testified that he gave Employee verbal permission to make that change on the form. Dr. Rifka testified that because Employee's request was still within the legal time frame for recovery from this type of procedure, he had no issue in extending the time for the return to work.

Dr. Rifka stated that he also allowed Employee to redact portions of the form in paragraph three and Part A, "Medical Facts," where it asks the doctor to describe other relevant medical facts related to the condition where the patient needed care. In addition, Dr. Rifka testified that he gave Employee verbal permission to redact anything private in nature that divulged the nature of her disease. He explained that in his practice, he allows his patients to redact information that is in violation of the privacy laws of the Health Insurance Portability and Accountability Act ("HIPAA"). Dr. Rifka testified that he physically saw Employee in his office on November 24, 2015. He stated that the next time he saw her in the office was in February 2016. Dr. Rifka explained that Employee also visited the Bethesda office of the practice where she was treated by Dr. Sarhan, the surgeon who performed the procedure. Dr. Rifka explained that Dr. Sarhan primarily works out of the Bethesda office, while he is in the Washington, D.C. location of the practice.

Employee's Position

Employee contends that she did not falsify any information in submitting her documents for FMLA. Employee maintains that she was confused with regard to the forms and that due to personal cognitive challenges she didn't understand all the requirements of the forms.[4] She indicated that on several occasions she asked for assistance, and believed that what she provided to Ms. Phillips was correct. Employee indicated that she received verbal permission from her doctor, Dr. Rifka, to alter the documents with regard to her medical diagnosis and also for the return to work form that she submitted.[5] Employee contends that Dr. Rifka was her treating physician, while Dr. Sarhan only completed the surgery. Employee asserts that she did no wrongdoing with regard to any of the forms and believes that the thirty (30) day suspension was unwarranted.

Agency's position

Agency asserts that it appropriately administered an adverse action in this matter. Agency contends that with regard to preparation and submission of FMLA documentation, Employee made (1) *false statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter*, pursuant to Chapter 16 1605.4(b) (2); and (2) *made false statements, including knowing and willfully reporting false and misleading information or purposely omitting facts to any supervisor* pursuant to Chapter 16 1605.4(f) (2).[6] Agency contends that on September 24, 2015, Employee submitted a PFL form which indicated a need of 160 hours of leave.[7] On the form, the care was indicated for her mother, Karen Toney. On November 2, 2015, Employee provided Section III from the treating surgeon, Dr. Abba Sarhan, which reflected a leave

[4] Employee Petition For Appeal (June 8, 2016).
[5] Employee Closing Arguments (December 1, 2017).
[6] Agency Closing Arguments (December 1, 2017).
[7] Agency Answer at Tab 3 (July 8, 2016).

time of November 10, 2015 through December 10, 2015.[8] Through a subsequent email thread on November 6, 2015 through November 9, 2015 with Agency HR Specialist Rachel Phillips and HR Gria Hernandez, Agency determined that Employee was the actual recipient of leave for medical care, and needed to fill out a FMLA form. On November 9, 2015, Employee submitted the DC FMLA form. This form was signed by Agency HR Specialist, Rachel Phillips on November 12, 2015 and was subsequently approved.

Upon Employee's return to work on December 9, 2015, Agency avers that its representatives realized inconsistences with the documentation submitted by Employee, specifically that (1) dates appeared to have been altered on a return to work notice and that medical information had been redacted (with white-out) Consequently, Agency contacted the Columbia Fertility Associates (practice that provided care for Employee) directly for documentation related to Employee. Materials received via fax on February 9, 2016, and February 10, 2016 were reviewed and were found to be inconsistent with documents submitted by Employee. Specifically, Agency noted that the November 2, 2015 document reflected Dr. Sarhan's medical incapacity section indicated an estimated date of November 10, 2017 through November 17, 2017. Further, Agency noted that the November 30, 2015 return to work form received had a return to work date of December 1, 2015.

Following these events, Agency asserts that it began its investigative process. Agency avers that Employee had redacted information in Section III, the dates for leave were November 10, 2015 through December 10, 2015, and the return to work date was December 8, 2015. Agency argued that it appeared Employee had used white out and had written over the date in altering these documents. Agency asserts that Employee maintained that she had some confusion in filling out the forms, and claimed that she received verbal consent from her doctor to alter the forms. Following the investigation, Agency proposed suspension for a total of thirty days[9], charging employee with two charges of false statements pursuant to DPM §1605.4(b)(2) and §1605.4(b)(4), and unauthorized absence of five workdays or more, pursuant DPM §1605.4(f)(2). In a Final Agency Action dated May 5, 2016, the hearing officer sustained the two charges of false statement but dismissed the AWOL charge because of receipt of return to work dated February 29, 2016. The hearing officer noted that she was unpersuaded by Employee's claim that she had receives verbal consent to alter the forms. As a result, Agency suspended Employee for two (2) fifteen (15) day periods to be served consecutively, effective May 31, 2016[10].

Agency avers that it considered all the relevant Douglas factors in making its determination with regard to assessing the penalty in this matter. Agency also contends that it appropriately utilized the DPM Chapter 16 ("2016 DPM") that was made effective February 5, 2016 (versus the DPM that was effective as of July 13, 2012, hereinafter noted as "2012 DPM"), because in this instance, they were not aware of the misconduct until the DPM 2016 was effectuated and also because the bargaining unit (ASFMCE) that Employee was a part of had already engaged in impacts and effects bargaining.[11] However, Agency notes that if OEA disagrees and finds that the incorrect version was

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[8] *Id.*
[9] Thirty days were comprised of two fifteen day suspensions to be served consecutively.
[10] Employee's Petition for Appeal at Final Agency Notice (June 8, 2017).
[11] Agency's Closing Arguments at Page 17. (December 1, 2017). It should be noted that Agency in making this argument provided no subsequent documentation, the CBA or otherwise, that would substantiate this assertion. Rather, Agency relied on the testimony provided by Ms. Gria Hernandez during the Evidentiary Hearing on October 17, 2017.

used (which it does not conceded) that it would result in harmless procedural error since the penalty range would be the same.[12]

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee is employed by Agency as Vocational Rehabilitation Specialist, with the DDS Rehabilitation Services Administration ("RSA").[13] In a final agency action notice referred to as the "Final Decision on the Proposed Suspension of 30 Days", dated May 5, 2016, Employee received final notice of Agency's decision to suspend her without pay for a total of thirty (30) days (two fifteen day suspensions to be served consecutively) from her position for violation of Chapter 16 of DPM §1605.4(b)(2)—"False statements, including: misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; (2) DPM § 1605.4 (b)(4) - "False statements, including: knowingly and willfully reporting false or misleading information or purposely omitting material facts to any superior." The effective date of the suspension was May 31, 2016.[14]

ANALYSIS

Appropriate Version of DPM

In an Order dated March 13, 2017, the undersigned required the parties to address whether Agency, in administering the adverse action against Employee utilized the appropriate version of the District Personnel Manual ("DPM") in administering the instant adverse action. Specifically, parties were to address whether the DPM Chapter 16 version effective as of August 2012[15] or February 2016[16] should be applicable to this action. Employee proffered that Agency did not use the appropriate code version. Employee asserted that Agency used the rules punitively and did not use the "correct choice in the cause of action.[17]

Agency asserted that its adverse action was properly guided by and assessed under the February 2016 ("2016 DPM") version of DPM Chapter 16. Agency argued that its assessment was done appropriately under the 2016 DPM citing that, "notwithstanding the general rule that a statute should not be applied retroactively absent clear legislative intent, the Agency applied the 2016 version of DPM Chapter 16 in these circumstances because the latest version of the regulations did not change the legal consequences of Employee's various behaviors between September 2015 and February 2016."[18] Further, the Agency cites that they "were not even aware of the misconduct for which adverse action was taken until on or after February 9, 2016, and the adverse action was initiated by Agency after the regulations became effective." Additionally, Agency argues that, "DDS applied the correct version of the District Personnel Manuel Chapter 16 effective, February 6, 2016, in recommending and taking corrective action because Ms. Toney is a member of the collective bargaining unit ("AFSCME") that had already engaged in impacts and effects bargaining."[19] Further,

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[12] *Id.*
[13] Employee's Petition for Appeal (June 8, 2016).
[14] Employee was also charged with violating DPM § 1605.4(f) (2) - "Unauthorized absence of five (5) workdays or more." However, the hearing officer rescinded that charge in the final action.
[15] DPM Chapter 16 effective July 13, 2012, as reflected by the August 26, 2012,Transmittal Date.
[16] DPM Chapter 16 effective February 5, 2016, as reflected by the February 26, 2016 Transmittal Date
[17] Employee's Legal Brief (April 10, 2017).
[18] Agency's Supplemental Brief at Page 4 (March 27, 2017).
[19] Agency Closing Arguments at Page 17 (December 1, 2017).

Agency contends that Employee's "affirmative" conduct that resulted in the instant adverse action took place between September 2015 and December 2015.[20]

Agency asserts that the "balance of the affirmative conduct", occurred after the effective date (February 5, 2016) for the 2016 DPM.[21] Agency also avers that they were not aware of Employee's misconduct until they found discrepancies in documentation submitted by Employee following a facsimile communication received from Employee's treating physician on February 9, 2016. Consequently, Agency argues that it did not provide its Notice of Proposed Adverse action until March 6, 2016, and the final decision was not delivered to Employee until May 5, 2016. As a result, Agency argues that under these circumstances it was appropriate to use the 2016 DPM version in administering this adverse action. Lastly, Agency argues that *assuming arguendo* that they did utilize the incorrect version of the DPM (which it does not concede that they did) in administering the instant adverse action that procedurally, the application of either version of DPM Chapter 16 would have resulted in the same adverse action and would constitute harmless procedural error."[22]

The District Personnel Manual regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. The 2012 DPM version was effective as of July 13, 2012,[23] and was effective until the 2016 DPM version was made effective on February 5, 2016.[24] Consistent with the findings of the U.S. Supreme Court, OEA has held that there is a presumption in which the "legal effect of one's conduct should be assessed under the law that existed when the conduct took place."[25] Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."[26] Here, Agency recognized upon Employee's return to work on December 9, 2015, that there were potential discrepancies in FMLA documentation submitted by Employee. Agency does not provide any reasoning as to why it was not until February 9, 2016, that subsequent documentation was requested from the treating physicians' office to confirm their suspicions. A subsequent investigative interview was held on February 11, 2016, wherein Agency maintains that Employee submitted false statements as well. The undersigned finds that upon review of the record Agency improperly used the 2016 DPM given that it was not made effective until February 5, 2016. The actions for which Employee was charged occurred in September 2015 through December 2015, with only one additional instance during a period of investigation in which false statements were alleged.

However, given that the Table of Penalties (2012 DPM)[27] and the Table Illustrative Actions (DPM 2016)[28] reflect the same range for penalties for this cause of action, I find that Agency's error constituted harmless procedural error pursuant to OEA Rule 631.3. The range of penalties for these causes of action in comparing the 2012 DPM Table of Appropriate Penalties ("TAP") and the 2016 DPM Table of Illustrative Actions ("TIA"), reflect similar penalty ranges. Under TAP, a first offense

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[20] Agency's Supplemental Brief at Page (March 27, 2017).
[21] *Id.* at Page 6.
[22] Agency Supplemental Legal Brief at Page 4 and 8, citing *Recio v. DC Alcoholic Beverage Control Bd.*, 75 A.2d 136, 140 (D.C. 2013); and *Montgomery c. District of Columbia*, 598 A.2d 163,166 (D.C. 1991). (March 27, 2017).
[23] Transmittal Date reflects as of August 27, 2012 for the 2012 DPM Version, and the 2016 Transmittal Date is as of February 26, 2016.
[24] *Id.*
[25] *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 10, 2010).
[26] *Id.*
[27] 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).
[28] DPM §1607.2(b) (2016)

for violation of DPM §1603.3(c), and DPM §1603.3(f) (6)[29] both range of Suspension for 15 Days.[30] The penalty in the TIA reflects that a first occurrence for false statements in connection DPM § 1605.4(b)(2), is reprimand to removal, and for §1605.4(b)(4), the range is a seven day (7) suspension to removal. Wherefore, the undersigned finds that Agency's assessment of the fifteen (15) day penalty for each charge fell into the range of penalties under both versions of the DPM. Thus, the undersigns find that while Agency improperly utilized the 2016 DPM given that misconduct occurred at the time the 2012 DPM was effective, that this error did not cause "substantial harm or prejudice" to Employee, and did not affect its final decision to take action in the instant matter.

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was assessed two (2) fifteen days suspensions pursuant to: DPM § 1605.4(b)(2) – "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter."; and DPM 1605.2(f)(2) –"False statements, including knowing and willfully reporting false and misleading information or purposely omitting facts to any supervisor."

Charge 1- DPM § 1605.4(b) (2) – "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter."

OEA has held, that to sustain a falsification charge, that "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency.[31] In sustaining the aforementioned charge upon Employee,

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[29] DPM §1603.3(c)– "Any knowing or negligent material misrepresentation on other document given to government agency; DPM §1603.3(f) (6) – Any on-duty or employment-related act or omission that interfere with the efficiency and integrity of government – misfeasance." Misfeasance, as described by the DPM includes: careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized uses of government resources; using or authorizing the use of government resources for other than official business. The undersigned relies on this comparison of the DPM because Agency relied on these causes of actions in its Supplement Brief submitted on March 27, 2017.

[30] 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

[31] *John J. Barbudsin v Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

Agency considered and was ultimately "unpersuaded", with "Employee's assertion that she had verbal permission to alter the parts of FMLA form or return to work notice."[32] Agency determined that the charge should be sustained because of Employee's admittance of "whiting out" and changing the forms on two (2) previous occasions.[33] However, during the Evidentiary Hearing held in this matter on October 17, 2017, Dr. Safa Rifka, Employee's physician, corroborated Employee's assertions, as he confirmed that he provided Employee with verbal consent to extend her return to work until December 8, 2015; and that he gave permission to redact any items that may violate Employee's privacy protections.[34] Without going into the personal and private nature of Employee's condition, the doctor explained that the type of procedure Employee underwent could result in up to four (4) weeks of recovery time.[35] Further, Dr. Rifka explained that any patient had the right to redact any information of a private nature and that he gave verbal permission to Employee to redact private information.[36]

During the course of the Evidentiary Hearing, I had the opportunity to listen to the testimony provided by Dr. Rifka and found his testimony to be credible. Further, the undersigned finds it significant that Agency rescinded the charge of AWOL once it received confirmation in February 2016 that Employee's return to work date was in fact extended until December 8, 2015.[37] The undersigned finds that this also supports Employee's claim that she had verbal permission to alter the return to work form to reflect December 8, 2015. In assessing this adverse action, Agency maintained it was unpersuaded by Employee's claims of having received verbal consent from her physician. Upon consideration of the aforementioned findings and the documentary and testimonial evidence set forth in the record, I find that Agency has not met its burden of proof by a preponderance of evidence with regard to this cause of action.

Charge 2 -DPM 1605.2(f) (2) –"False statements, including knowingly and willfully reporting false and misleading information or purposely omitting facts to any supervisor."

In considering this cause of action, Agency again attested that it was unpersuaded by Employee's assertion that she received verbal consent to alter the documents. Specifically, Agency cited that Employee provided false statements to Ms. Hernandez, during the course of the internal investigation. Agency noted that this charge was distinguished with regard to the changes made in the "medical incapacity" section of the form. Agency found that Employee changed the document that was signed by Dr. Sarhan (surgeon) on November 2, 2015. In particular, Agency cited that the document received on February 9, 2016 from Dr. Sarhan reflected the estimated medical incapacity as November 10, 2015 through November 17, 2015. Employee's submissions of these same documents contained a medical incapacity date of November 10, 2015, through December 10, 2015. Upon consideration of the record, the undersigned finds that there is not substantive evidence to support Employee's claim that she was given the verbal consent to change the medical incapacity date in the forms. Further, the medical incapacity listed in the documentation submitted by Employee in November 2015, does not correspond with the medical record that bears the same signature date (November 2, 2015) that was received by fax directly from the office on February 9, 2016. Consequently, the undersigned finds that Agency has met its burden by preponderant evidence and has adequately proven that there was cause for action with regard to this charge.

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[32] Agency Answer at Page 8 (July 8, 2016).
[33] *Id.*
[34] *See.* Evidentiary Hearing Transcript (Tr.) held October 17, 2017 at Pages 13, 22-37.
[35] *Id.* at page 26.
[36] *Id.* at Page 30
[37] Received in accordance with directive in Final agency Action and was signed by the surgeon, Dr. Abba Sarhan.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency's action with regard to the charge of false statements pursuant to DPM 1605.2(f) (2) –"False statements, including knowingly and willfully reporting false and misleading information or purposely omitting facts to any supervisor" was taken for cause, and as such Agency can rely on this charge in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[38] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[39] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[40]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.[41] Further, Chapter 16 § 1607.1(b)(2)(4) of the District Personnel Manual Table of Illustrative Actions

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[38] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[39] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

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

[41] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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;
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 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;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) 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;
10) potential for the employee's rehabilitation;
11) 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
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

("TIA") provides that the appropriate penalty for a first occurrence for a charge of violating DPM 1604.5(b)(4) ranges from "7-day Suspension to Removal."[42] Wherefore, the undersigned finds that Agency properly exercised its discretion and its chosen penalty of a fifteen (15) suspension is reasonable under the circumstances and not a clear error of judgement.

With regard to the false statements charge pursuant to DPM §1605.4(b)(2); the undersigned finds, for the reasons previously cited, that Agency did not meet its burden to establish a cause for adverse action for "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter." As a result, I find that the penalty of the fifteen (15) day suspension was not appropriate. Consequently, I conclude that Agency's action should be upheld, in part, and reversed in part.

ORDER

Based on the foregoing it is hereby **ORDERED that:**

1. Agency's action of suspending Employee from service for fifteen (15) days with regard to Charge 2 is hereby **UPHELD.**
2. Agency's action of suspending Employee from service for fifteen (15) days with regard to Charge 1 is hereby **REVERSED**; and Agency shall reimburse employee all pay and benefits lost as a result of this suspension.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

[42] Table of Illustrative Actions 2016. It should be noted that under the 2012 DPM Table of Appropriate Penalties ("TAP"), the penalty for this cause of action on a first offense is Suspension for 15 days see Chapter 16 §1619.1.

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, 955 L'Enfant Plaza Suite 2500, 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** was sent by regular mail on this day to:

Charis Toney
7701 Starshine Drive
District Heights, MD 20747

Darnise Henry Bush
2703 Shipley Terrace, SE
#4
Washington, DC 20020

Mark D. Back., Esq.
General Counsel
DC Department on Disability Services
One Independence Square
250 E Street, SW, Sixth Floor
Washington, DC 20024

Katrina Hill
Clerk

February 21, 2018
Date

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
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

D.C. Department on Disability Services, Petitioner, v. District of Columbia Office of Employee Appeals, Respondent.	Case No. 2017 CA 002192 P(MPA) Judge John M. Campbell

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Charis Toney v. D.C. Department on Disability Services,* OEA Matter No. 1601-0053-16. The record consists of two (2) volumes containing thirty-six (36) tabs.

Sommer Murphy
Deputy General Counsel

LASHEKA BROWN BASSEY NOTARY PUBLIC DISTRICT OF COLUMBIA MY COMMISSION EXPIRES 6/14/2021

District of Columbia: SS
Subscribed and Sworn to before me
this 18th day of May, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

D.C. Department on Disability Services, Petitioner v. District of Columbia Office of Employee Appeals Respondent, Charis Toney Intervenor.	Case No. 2018 CA 002192 P(MPA) Judge John M. Campbell **Next Event: Status Hearing** **Friday, March 22, 2019 at 10:30 a.m.**

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on October 16, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision in the matter of *Charis Toney v. D.C. Department on Disability Services*, OEA Matter Number 1601-0053-16 (February 21, 2018), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2018, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

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Respectfully submitted,

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Exhibit 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: CHARIS TONEY, Employee v. D.C. DEPARTMENT ON DISABILITY SERVICES, Agency	OEA Matter No. 1601-0053-16 Date of Issuance: February 21, 2018 Michelle R. Harris, Esq. Administrative Judge

Darnise Henry Bush, Employee Representative
Mark D. Back, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 8, 2016, Charis Toney ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department on Disability Services ("Agency" or "DDS") decision to suspend her from service for a total of thirty (30) days[1]. On July 8, 2016, Agency filed its Answer to Employee's Petition for Appeal.

Following a failed attempt at mediation, I was assigned this matter on September 7, 2016. On September 16, 2016, I issued an Order Convening a Prehearing Conference to be scheduled for November 8, 2016. However, upon review of that date and determining it was Election Day; the undersigned issued a subsequent Order on October 12, 2016, rescheduling the Prehearing Conference for November 16, 2016. Both parties were present for the Prehearing Conference on November 16, 2016. Following that conference, on November 18, 2016, I issued a Post Prehearing Conference Order requiring the parties to submit briefs addressing whether Agency had cause to take adverse action against Employee and whether the 30-day suspension was appropriate under the circumstances. Agency's brief was due on or before December 16, 2016, and Employee's brief was due on or before January 17, 2017. Briefs were submitted in accordance with the prescribed deadlines.

Following a review of the briefs, I issued an Order scheduling a Status/Prehearing Conference for March 13, 2017. Following the Status/Prehearing Conference on March 13, 2017, I

[1] Two fifteen-day suspensions were levied against Employee and were served consecutively.

issued a Post Status/Prehearing Conference Order requiring parties to address additional issues in supplemental briefs. Agency's supplemental brief was due on or before March 27, 2017, and Employee's brief was due on or before April 10, 2017. Both parties submitted their respective briefs. Based on the review of the supplemental briefs, the undersigned determined that an Evidentiary Hearing was warranted in this matter. As a result, I issued an Order on June 8, 2017, scheduling a Status Conference for June 28, 2017 for the purposes of scheduling an Evidentiary Hearing.[2] Following the status conference, on June 30, 2017, I issued an Order Convening an Evidentiary Hearing in this matter for Tuesday, October 17, 2017. The Evidentiary Hearing was held on October 17, 2017, where both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on November 1, 2017, requiring both parties to submit their written closing arguments on or before December 1, 2017. Both parties submitted their written closing arguments by the prescribed deadline. The record is now closed.

JURISDICTION

The 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 two fifteen (15) day suspensions were appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

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.

[2] On June 19, 2017, Agency filed a Motion to reschedule the June 28, 2017 status hearing. I issued an Order on June 19, 2017 granting Agency's Motion and rescheduled the Status Conference to June 27, 2017.

SUMMARY OF TESTIMONY

On October 17, 2017, 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 Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-Chief

Rachel Phillips ("Phillips") *Tr. 42-114*

Rachel Phillips ("Phillips") worked for the Department of Disability Services ("Agency") as a Human Resources and Benefits specialist. She was responsible for processing employee benefits and was the Family Medical Leave Act ("FMLA") and Paid Family Leave ("PFL") coordinator.

Phillips testified that the Paid Family Leave ("PFL") Act was provided by Agency and offered to its employees. She explained that if an employee requested PFL, they could receive up to three hundred and twenty hours (320) of leave, which equates to eight (8) weeks of paid benefits. However, FMLA was unpaid and employees were required to use their own annual or sick leave because it was due to their own medical conditions. Phillips indicated that PFL is used when an employee is taking care of a family member, a birth of a child, adoption or foster care.

Phillips testified that when Employee requested leave, she indicated on the form that the care was for her mother. She stated that Employee filled out the forms on November 2, 2015, and requested to receive paid leave of one hundred and sixty (160) hours.

Initially, Phillips processed the request as a PFL because she thought it was for the care of Employee's family member. In addition, the document that Employee filled out indicated that she would be providing care for her mother, Karen B. Toney. Phillips stated that Employee provided her birth certificate as proof of relationship to her mother. After reviewing the medical documents signed by Dr. Sarhan, Phillips testified that she then realized that Employee was not caring for her mother, and that Employee was the person having surgery.

Phillips testified that Employee contacted her via email on November 6, 2015, asking for an update regarding her request. Phillips was out of the office the day Employee sent the email, but she contacted Employee the day that she returned to the office. Phillips stated that in her November 9, 2015 email, she informed Employee that she anticipated having her request processed by the end of the week. Phillips testified that Employee emailed her back stating that she was having surgery the next day. Phillips stated that she processed the PFL form so that Employee's request would go through.

Phillips explained that the medical form stated that Employee would be incapacitated from November 10, 2015 to December 10, 2015. The documentation stated that Employee could return to light duty on December 1, 2015. Phillips testified that, the note stated that Employee could come back to regular duty on December 10, 2015. However, Employee came back to work on December 8, 2015, and submitted a return to work note to Phillips.

Phillips stated that she relied on the documentation that she received to approve Employee for PFL, but since she did not qualify for that type of leave, Employee needed to submit a request for

FMLA. Employee subsequently filled out the FMLA paperwork and Phillips approved the letter on November 12, 2015. She stated that Employee indicated on her application that she used sixty (60) hours of annual leave and sixty (60) hours of sick leave.

On February 2, 2016, Phillips stated that Agency received a return to work notice that was signed by Dr. Rifka and dated November 30, 2015, indicating that Employee could be excused from work from November 15, 2015 to December 1, 2015. After further review of the document, Phillips testified that it appeared that there were other changes in the documentation that Employee previously provided to Agency. At this time, Phillips indicated that she thought that the documentation was altered and requested a copy from the practice/office where Employee was treated. Phillips stated she received a fax on February 9, 2016, from the office, and that she and her supervisor, Gria Hernandez ("Hernandez"), compared that the documentation with that previously submitted by Employee. Phillips testified that they discovered that Employee had redacted some of the documentation about her medical condition and diagnosis.

On cross-examination, Phillips stated that when she processed Employee's FMLA she had only worked for Agency for two (2) months. She testified that she most likely helped Employee complete the necessary application form. She attested that she emailed Employee the forms needed to submit her leave request. Phillips testified that the PFL and FMLA were the same application forms. She explained that while she could not recall if Employee expressed to her that she did not know how to fill out the forms, she would have assisted her in completing the forms. Phillips was unsure if Employee referred to PFL as Personal Family Leave.

Phillips stated that when Employee initially submitted the form, she marked the box that said that she was caring for a family member. Subsequently, it was discovered that Employee was not caring for a family member, so Phillips marked through it with a pink line. Phillips confirmed that Employee did not state that she needed surgery. She stated that the information that was put on the original PFL form was not the same information that went on the FMLA form. Phillips admitted that she told Employee to make a change in the leave category because she was having the surgery. Phillips explained that she asked Employee to submit her birth certificate to prove her relationship to her mother because at the time, Employee submitted a request for PFL. The FMLA was approved via a letter dated November 12, 2015. Phillips explained that it was approved after Employee's surgery on November 10, 2015, because she did not receive all documentation back prior to Employee taking leave for surgery. She did not recall what information that was missing in order to process the FMLA.

On redirect, Phillips stated that Agency had five (5) business days to process PFL or FMLA requests. She explained that four (4) business days transpired from November 2, 2015 and November 6, 2015, and explained that November 9, 2015, was the fifth business day. On November 9, 2015, Phillips contacted Employee to inform her that there was a discrepancy with her form. That was when Phillips received the revised and completed application for FMLA. She stated that the letter was approved on November 12, 2015. Phillips also testified that November 11, 2015, was Veteran's Day, a legal holiday; so she submitted and approved within two (2) days of receiving Employee's completed application.

Gria Hernandez ("Hernandez") *Tr. 116-205*

Gria Hernandez ("Hernandez") testified that she has worked as a Human Capital Administrator with Agency since January 2, 2012. Hernandez was responsible for all facets of Human Resources ("HR") benefits, labor relations, employee relations, and training. She stated that

she was the final authorizer for PFL and FMLA requests. Hernandez explained that Phillips was the HR specialist in her division, and received the applications for PFL, FMLA, and Americans with Disabilities Act ("ADA"). She stated that Phillips verified and validated the applications and presented it to her with the record. Hernández affirmed that she worked closely with Phillips and that she reviewed and signed off on the applications that were presented to her. Hernandez stated that the application forms could be found in their office or, if requested, emailed by Phillips.

Hernandez explained that PFL was a form of FMLA, but the benefit of PFL was to allow employees of the District of Columbia to care for a loved one with a chronic illness or to spend time with a newly placed foster or adopted child. She stated that an employee was entitled to receive up to three hundred and twenty (320) hours of paid leave.

Hernandez testified that she does not automatically process applications that come in for PFL or FMLA. She testified that if someone requested PFL for the birth of a child, Agency might submit the application in June, but the child may not be due until October, so there would be some time lapse in the processing of the request. She explained that once the application was verified and deemed valid, it was Phillips' responsibility to send the required forms to payroll. Payroll would subsequently load up to three hundred twenty hours onto the employee's leave bank on PeopleSoft.

Hernandez testified that after reviewing Employee's application, it was not clear to her if Employee was providing care for her mother, or if she was going to be on leave for her own health conditions. Hernandez explained that Phillips asked her to review Employee's application. Hernandez indicated that the answers given on the PFL form were from a fertility clinic. Hernandez stated that she asked Phillips if she was sure that the application was for Employee's mother or for herself. Hernandez testified that she had Phillips contact the doctor's office to confirm. The doctor's office informed Agency that Employee was receiving care and that it was not her mother. Hernandez indicated that there was email correspondence exchanged between her, Employee, and Phillips with regard to the documentation. Hernandez stated that Employee indicated in the November 6, 2015 email to Phillips that she was having surgery. Hernandez testified that she told Employee that she could not use PFL for herself.

On the form dated November 9, 2015, Employee requested time off from November 10 through December 10, 2015, for a personal health condition. She requested the use of sixty (60) hours of annual leave and sixty (60) hours of sick leave. Hernandez stated that she allowed the November 2, 2015 PFL Form to be approved because Agency did not want to cause its employees a hard time, especially if they were going through a serious health condition. She explained that if they were able to be flexible, they would work with the employee because the PFL and FMLA were essentially the same form and questions. Further, Hernandez stated that Employee indicated on the form and in her email that she was having surgery on November 10, 2015.

Hernandez confirmed that the FMLA application was approved on November 12, 2015. She stated that it was approved within two (2) business days and stated that Agency generally has seven (7) business days to approve an application. She testified that the approval letter stated that Employee was required to provide a return to work note. Hernandez stated that Employee returned to work on December 8, 2015. Hernandez testified that when the return to work note was brought to her, it was clear that it was a copy and not an original note. Hernandez noticed that the number "eight" was written in pen. Hernandez asked Phillips to contact the doctor's office to confirm that the note came from their office.

Hernandez testified that Phillips contacted the doctor's office to speak with Dr. Sarhan, but she was unavailable. Hernandez indicated that when they reviewed the notice, she saw Dr. Rifka's name and realized that Drs. Rifka and Sarhan were part of the same practice. On February 10, 2016, Hernandez received a copy of the return to work notice from Dr. Rifka that stated that Employee was under his professional care and excused her from duty from November 10, 2015 through December 1, 2015. Hernandez indicated that the notice stated that Employee was to return to light duty on December 1, 2015 and regular duty on December 15, 2015. Hernandez testified that the documentation previously received from the doctor's office did not match this documentation that Employee submitted.

Hernandez indicated that upon review, she prepared a supervisory record citing Employee's abuse of FMLA and for altering the forms. Hernandez testified that on the first page, there was language that had been redacted (white out) regarding Employee's medical diagnosis. She also stated that on page two of the form that Employee submitted, that it stated that she would be out from November 10, 2015 through December 10, 2015. However, the form that was faxed over by the doctor's office stated that she would be out from November 10, 2015 until November 17, 2015.

Hernandez explained that the approved FMLA form indicated that Employee was granted leave from November 10, 2015 to December 10, 2015. She stated that Agency relied on the certification from the doctor that Employee provided to them. Hernandez stated that at the time of Employee's submission, she did not believe that the forms had been altered. Further, Hernandez explained that "no" was circled for the question asking if Employee required care on an intermittent or regular basis. However, the documentation that Employee provided clearly depicted a markup of the word "no." Hernandez posited that the word "no" had been changed to "yes". Hernandez testified that on February 10, 2016, she received a copy of the return to work notice from Dr. Rifka. That form stated that Employee was under Dr. Rifka's professional care and that she was excused from working from November 10, 2015 through December 1, 2015. The form also indicated that Employee was to return to light duty on December 1, 2015, and resume to regular duty on December 15, 2015.

Hernandez stated that she also scheduled a meeting with Employee regarding the forms. Hernandez testified that during the investigation, Employee and her representative were recorded during an interview that was held on February 10, 2016.

(*The recording was played during Hernandez's testimony. The following reflects a summary of the events from the February 10, 2016, recorded interview).* On the recording, Hernandez stated her name and asked Employee and her representative, Darnise Henry-Bush, to identify themselves. Hernandez informed them that the purpose of the investigation was to discuss the documentation submitted for FMLA. In addition, Jessica Gray, Legal Relations Specialist at the Department on Disability Services, was present. During the investigation, Employee stated that she knew that FMLA was Family Medical Leave Act. Employee also stated that she requested FMLA at the end of October because she had a scheduled surgery. Employee submitted her forms to the HR department. Employee told Hernandez that there was an error because Phillips assumed that the request was for her mother, but it was for Employee. Further, Employee explained to Hernandez that there was a miscommunication because when Phillips contacted her doctor, Phillips asked the office for information regarding her mother, and not her. Employee stated during the investigation/interview that she filled out the FMLA form and her doctor completed his portion. Employee recalled filling out the document that was a certification of a health care provider for family member's serious health condition.

On the recording of the interview, Hernandez explained that Employee stated her name and indicated on the form that she was providing care for her mother. Employee told Hernandez that she did not understand the form and thought that because she was having surgery, the form asked her to provide an emergency contact. Thus, Employee provided her mother's contact information because she would be providing care for Employee after surgery. Employee stated that she did not know who checked the box that said she was caring for a family member because she knew that she was the one having the surgery and not caring for a family member.

During the interview with Hernandez, Employee acknowledged that she requested one hundred and sixty (160) hours of leave for November 10, 2015 through December 10, 2015. Subsequently, Employee spoke with Phillips because she found out that her leave was not approved. Philips asked Employee if her mother was having surgery and Employee told her that she was having surgery. Phillips informed Employee that she would have to use her own annual and sick leave. Employee explained that she emailed Phillips a note from her doctor that she was returning to work early on December 7, 2015.

During the same interview, Hernandez went over two forms with Employee, one form was typed and the other was handwritten. Employee acknowledged that the forms were the same, but that some of the information was missing off of the form that she submitted. She explained that her doctor allowed her to whiteout the personal details of her medical condition. Further, she explained that she altered her return to work date from December 1, 2015 to December 8, 2015 because she was not well enough to return to work and received verbal consent from her doctor to alter the date on the return to work form. Employee also stated on the recording that she did not alter the forms that were sent to her doctor by Phillips. While Employee altered her return to work document, she stated that she did not alter the document other than her personal diagnosis while she was out on FMLA. *(End of Summary of Recorded Interview)*

After the interview, Hernandez testified that she contacted Employee's doctor. She explained that she had to contact two offices because although both doctors were in the same practice, they were in different offices. Dr. Sarhan's office completed the FMLA form and informed Hernandez that they do not give patients permission to alter documents. Hernandez indicated that when they contacted Dr. Rifka's office, they did not indicate that they gave Employee permission to change the form. The office informed Hernandez that they would fax over the documents that they had on file for Employee.

Hernandez testified that Agency charged Employee with adverse action that proposed a thirty (30) day suspension. She stated that Employee received the March 7, 2016, advanced notice of proposed thirty-day suspension and confirmed that she was the proposing official, and that Ms. Bonsack was the deciding official. Hernandez explained that Ms. Bonsack did not sustain all three causes because she dismissed the Absent without Official Leave ("AWOL") charge. Hernandez stated that she applied the February 2016 revised District Personnel Manual ("DPM") in applying Employee's discipline because of the newly-adopted Table of Penalties[3]. Further, she explained that if Employee was reviewed under the old DPM, the penalties would have been greater and she would have proposed termination.

On cross-examination, Hernandez opined that Employee lied because of her demeanor. She explained that Employee looked surprised when she pointed out the difference between the faxed documents that Agency received from Dr. Sarhan's office and what was previously submitted by

[3] The newly adopted table is called the "Table of Illustrative Actions."

Employee. Further, Employee continued to look at her representative Ms. Henry-Bush for help answering the questions and asked for a break to speak with her representative privately. Hernandez testified that it was Employee's responsibility to fill out her portion of the FMLA form. She stated that she made sure that Phillips explained what FMLA was when there was confusion with PFL.

Deborah Bonsak ("Bonsack") *Tr. 207-220*

Deborah Bonsack ("Bonsack") worked as the Deputy Director for Administration for Agency. She was also Hernandez's supervisor. Bonsack testified that she was the deciding official in Employee's case. She issued and signed the advance notice of proposed discipline. Before signing the May 5, 2016 Final Decision, Bonsack considered the attachments that were provided as part of the investigation.

Bonsack testified that based upon her review of Employee's return to work notice that extended Employee's leave until December 8, 2015, Bonsack decided that she would not sustain the AWOL charge. However, she sustained the two allegations of false statements because it was determined that Employee falsified information on an official record. She explained that Employee's conduct constituted a serious offense because she was entrusted with the distribution and decisions regarding training, vocational rehabilitation and future funding. Bonsack stated that it was essential to be able to trust Employee, and that falsifying any type of official documents caused concern regarding Employee's trustworthiness.

Bonsack indicated that she did not recall if the 2012 Table of Penalties or the February 2016 Table of Illustrative Actions were used in selecting Employee's penalty. She did list out the *Douglas Factors* in order to determine what the penalty would be. Bonsack testified that after reviewing the factors, although termination was an option, she believed that suspension was a reasonable disciplinary measure under the circumstances. Bonsack stated that she believed that a thirty (30) day suspension was severe enough to get Employee's attention and correct the behavior so it would not occur again.

On cross-examination, Bonsack testified that she based her decision on the false statements that were made by Employee and deemed falsifying documents to be a serious offense.

Employee's Case-In-Chief

Dr. Safa Rifka ("Dr. Rifka") *Tr. 12-39*

Dr. Safa Rifka ("Rifka") is a physician at Columbia Fertility Associates. He testified that he provided medical care to Charis Toney ("Employee") and gave verbal consent/permission for her to redact her personal diagnosis from the Family Medical Leave Act ("FMLA") form in relation to her procedure and to alter the return to work form. He confirmed that Karen Toney was not his patient.

On cross-examination, Dr. Rifka stated that he filled out the FMLA form. Dr. Rifka further stated that he wrote the original note excusing Employee from work from November 10, 2015 through December 8, 2015. He explained that Dr. Sarhan, his partner in the practice and Employee's surgeon, provided the return to work notice because it was customary for the surgeon to do so. While Dr. Rifka did not provide the return to work notice, he stated that it was not unusual for the original physician to also provide a return to work notice.

Dr. Rifka testified that he could not recall the exact date that he gave Employee verbal permission to alter the document that he signed which certified her time out of work as a result of her

side effects from the surgery. Dr. Rifka explained that on November 30, 2015, he indicated that Employee was able to return to light duty work on December 1, 2015, and released Employee to perform regular activity on December 15, 2015. Dr. Rifka testified that the type of surgery Employee underwent required between two (2) to four (4) weeks of recovery. He explained that after November 30, 2015, Employee asked him to extend her time from December 1, 2015 to December 8, 2015, due to ongoing issues from the surgery. Dr. Rifka testified that he gave Employee verbal permission to make that change on the form. Dr. Rifka testified that because Employee's request was still within the legal time frame for recovery from this type of procedure, he had no issue in extending the time for the return to work.

Dr. Rifka stated that he also allowed Employee to redact portions of the form in paragraph three and Part A, "Medical Facts," where it asks the doctor to describe other relevant medical facts related to the condition where the patient needed care. In addition, Dr. Rifka testified that he gave Employee verbal permission to redact anything private in nature that divulged the nature of her disease. He explained that in his practice, he allows his patients to redact information that is in violation of the privacy laws of the Health Insurance Portability and Accountability Act ("HIPAA"). Dr. Rifka testified that he physically saw Employee in his office on November 24, 2015. He stated that the next time he saw her in the office was in February 2016. Dr. Rifka explained that Employee also visited the Bethesda office of the practice where she was treated by Dr. Sarhan, the surgeon who performed the procedure. Dr. Rifka explained that Dr. Sarhan primarily works out of the Bethesda office, while he is in the Washington, D.C. location of the practice.

Employee's Position

Employee contends that she did not falsify any information in submitting her documents for FMLA. Employee maintains that she was confused with regard to the forms and that due to personal cognitive challenges she didn't understand all the requirements of the forms.[4] She indicated that on several occasions she asked for assistance, and believed that what she provided to Ms. Phillips was correct. Employee indicated that she received verbal permission from her doctor, Dr. Rifka, to alter the documents with regard to her medical diagnosis and also for the return to work form that she submitted.[5] Employee contends that Dr. Rifka was her treating physician, while Dr. Sarhan only completed the surgery. Employee asserts that she did no wrongdoing with regard to any of the forms and believes that the thirty (30) day suspension was unwarranted.

Agency's position

Agency asserts that it appropriately administered an adverse action in this matter. Agency contends that with regard to preparation and submission of FMLA documentation, Employee made (1) *false statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter*, pursuant to Chapter 16 1605.4(b) (2); and (2) *made false statements, including knowing and willfully reporting false and misleading information or purposely omitting facts to any supervisor* pursuant to Chapter 16 1605.4(f) (2).[6] Agency contends that on September 24, 2015, Employee submitted a PFL form which indicated a need of 160 hours of leave.[7] On the form, the care was indicated for her mother, Karen Toney. On November 2, 2015, Employee provided Section III from the treating surgeon, Dr. Abba Sarhan, which reflected a leave

[4] Employee Petition For Appeal (June 8, 2016).
[5] Employee Closing Arguments (December 1, 2017).
[6] Agency Closing Arguments (December 1, 2017).
[7] Agency Answer at Tab 3 (July 8, 2016).

time of November 10, 2015 through December 10, 2015.[8] Through a subsequent email thread on November 6, 2015 through November 9, 2015 with Agency HR Specialist Rachel Phillips and HR Gria Hernandez, Agency determined that Employee was the actual recipient of leave for medical care, and needed to fill out a FMLA form. On November 9, 2015, Employee submitted the DC FMLA form. This form was signed by Agency HR Specialist, Rachel Phillips on November 12, 2015 and was subsequently approved.

Upon Employee's return to work on December 9, 2015, Agency avers that its representatives realized inconsistences with the documentation submitted by Employee, specifically that (1) dates appeared to have been altered on a return to work notice and that medical information had been redacted (with white-out) Consequently, Agency contacted the Columbia Fertility Associates (practice that provided care for Employee) directly for documentation related to Employee. Materials received via fax on February 9, 2016, and February 10, 2016 were reviewed and were found to be inconsistent with documents submitted by Employee. Specifically, Agency noted that the November 2, 2015 document reflected Dr. Sarhan's medical incapacity section indicated an estimated date of November 10, 2017 through November 17, 2017. Further, Agency noted that the November 30, 2015 return to work form received had a return to work date of December 1, 2015.

Following these events, Agency asserts that it began its investigative process. Agency avers that Employee had redacted information in Section III, the dates for leave were November 10, 2015 through December 10, 2015, and the return to work date was December 8, 2015. Agency argued that it appeared Employee had used white out and had written over the date in altering these documents. Agency asserts that Employee maintained that she had some confusion in filling out the forms, and claimed that she received verbal consent from her doctor to alter the forms. Following the investigation, Agency proposed suspension for a total of thirty days[9], charging employee with two charges of false statements pursuant to DPM §1605.4(b)(2) and §1605.4(b)(4), and unauthorized absence of five workdays or more, pursuant DPM §1605.4(f)(2). In a Final Agency Action dated May 5, 2016, the hearing officer sustained the two charges of false statement but dismissed the AWOL charge because of receipt of return to work dated February 29, 2016. The hearing officer noted that she was unpersuaded by Employee's claim that she had receives verbal consent to alter the forms. As a result, Agency suspended Employee for two (2) fifteen (15) day periods to be served consecutively, effective May 31, 2016[10].

Agency avers that it considered all the relevant Douglas factors in making its determination with regard to assessing the penalty in this matter. Agency also contends that it appropriately utilized the DPM Chapter 16 ("2016 DPM") that was made effective February 5, 2016 (versus the DPM that was effective as of July 13, 2012, hereinafter noted as "2012 DPM"), because in this instance, they were not aware of the misconduct until the DPM 2016 was effectuated and also because the bargaining unit (ASFMCE) that Employee was a part of had already engaged in impacts and effects bargaining.[11] However, Agency notes that if OEA disagrees and finds that the incorrect version was

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[8] *Id.*
[9] Thirty days were comprised of two fifteen day suspensions to be served consecutively.
[10] Employee's Petition for Appeal at Final Agency Notice (June 8, 2017).
[11] Agency's Closing Arguments at Page 17. (December 1, 2017). It should be noted that Agency in making this argument provided no subsequent documentation, the CBA or otherwise, that would substantiate this assertion. Rather, Agency relied on the testimony provided by Ms. Gria Hernandez during the Evidentiary Hearing on October 17, 2017.

used (which it does not conceded) that it would result in harmless procedural error since the penalty range would be the same.[12]

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee is employed by Agency as Vocational Rehabilitation Specialist, with the DDS Rehabilitation Services Administration ("RSA").[13] In a final agency action notice referred to as the "Final Decision on the Proposed Suspension of 30 Days", dated May 5, 2016, Employee received final notice of Agency's decision to suspend her without pay for a total of thirty (30) days (two fifteen day suspensions to be served consecutively) from her position for violation of Chapter 16 of DPM §1605.4(b)(2)—"False statements, including: misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; (2) DPM § 1605.4 (b)(4) - "False statements, including: knowingly and willfully reporting false or misleading information or purposely omitting material facts to any superior." The effective date of the suspension was May 31, 2016.[14]

ANALYSIS

Appropriate Version of DPM

In an Order dated March 13, 2017, the undersigned required the parties to address whether Agency, in administering the adverse action against Employee utilized the appropriate version of the District Personnel Manual ("DPM") in administering the instant adverse action. Specifically, parties were to address whether the DPM Chapter 16 version effective as of August 2012[15] or February 2016[16] should be applicable to this action. Employee proffered that Agency did not use the appropriate code version. Employee asserted that Agency used the rules punitively and did not use the "correct choice in the cause of action.[17]

Agency asserted that its adverse action was properly guided by and assessed under the February 2016 ("2016 DPM") version of DPM Chapter 16. Agency argued that its assessment was done appropriately under the 2016 DPM citing that, "notwithstanding the general rule that a statute should not be applied retroactively absent clear legislative intent, the Agency applied the 2016 version of DPM Chapter 16 in these circumstances because the latest version of the regulations did not change the legal consequences of Employee's various behaviors between September 2015 and February 2016."[18] Further, the Agency cites that they "were not even aware of the misconduct for which adverse action was taken until on or after February 9, 2016, and the adverse action was initiated by Agency after the regulations became effective." Additionally, Agency argues that, "DDS applied the correct version of the District Personnel Manuel Chapter 16 effective, February 6, 2016, in recommending and taking corrective action because Ms. Toney is a member of the collective bargaining unit ("AFSCME") that had already engaged in impacts and effects bargaining."[19] Further,

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[12] *Id.*
[13] Employee's Petition for Appeal (June 8, 2016).
[14] Employee was also charged with violating DPM § 1605.4(f) (2) - "Unauthorized absence of five (5) workdays or more." However, the hearing officer rescinded that charge in the final action.
[15] DPM Chapter 16 effective July 13, 2012, as reflected by the August 26, 2012,Transmittal Date.
[16] DPM Chapter 16 effective February 5, 2016, as reflected by the February 26, 2016 Transmittal Date
[17] Employee's Legal Brief (April 10, 2017).
[18] Agency's Supplemental Brief at Page 4 (March 27, 2017).
[19] Agency Closing Arguments at Page 17 (December 1, 2017).

Agency contends that Employee's "affirmative" conduct that resulted in the instant adverse action took place between September 2015 and December 2015.[20]

Agency asserts that the "balance of the affirmative conduct", occurred after the effective date (February 5, 2016) for the 2016 DPM.[21] Agency also avers that they were not aware of Employee's misconduct until they found discrepancies in documentation submitted by Employee following a facsimile communication received from Employee's treating physician on February 9, 2016. Consequently, Agency argues that it did not provide its Notice of Proposed Adverse action until March 6, 2016, and the final decision was not delivered to Employee until May 5, 2016. As a result, Agency argues that under these circumstances it was appropriate to use the 2016 DPM version in administering this adverse action. Lastly, Agency argues that *assuming arguendo* that they did utilize the incorrect version of the DPM (which it does not concede that they did) in administering the instant adverse action that procedurally, the application of either version of DPM Chapter 16 would have resulted in the same adverse action and would constitute harmless procedural error."[22]

The District Personnel Manual regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. The 2012 DPM version was effective as of July 13, 2012,[23] and was effective until the 2016 DPM version was made effective on February 5, 2016.[24] Consistent with the findings of the U.S. Supreme Court, OEA has held that there is a presumption in which the "legal effect of one's conduct should be assessed under the law that existed when the conduct took place."[25] Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."[26] Here, Agency recognized upon Employee's return to work on December 9, 2015, that there were potential discrepancies in FMLA documentation submitted by Employee. Agency does not provide any reasoning as to why it was not until February 9, 2016, that subsequent documentation was requested from the treating physicians' office to confirm their suspicions. A subsequent investigative interview was held on February 11, 2016, wherein Agency maintains that Employee submitted false statements as well. The undersigned finds that upon review of the record Agency improperly used the 2016 DPM given that it was not made effective until February 5, 2016. The actions for which Employee was charged occurred in September 2015 through December 2015, with only one additional instance during a period of investigation in which false statements were alleged.

However, given that the Table of Penalties (2012 DPM)[27] and the Table Illustrative Actions (DPM 2016)[28] reflect the same range for penalties for this cause of action, I find that Agency's error constituted harmless procedural error pursuant to OEA Rule 631.3. The range of penalties for these causes of action in comparing the 2012 DPM Table of Appropriate Penalties ("TAP") and the 2016 DPM Table of Illustrative Actions ("TIA"), reflect similar penalty ranges. Under TAP, a first offense

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[20] Agency's Supplemental Brief at Page (March 27, 2017).
[21] *Id.* at Page 6.
[22] Agency Supplemental Legal Brief at Page 4 and 8, citing *Recio v. DC Alcoholic Beverage Control Bd.*, 75 A.2d 136, 140 (D.C. 2013); and *Montgomery c. District of Columbia*, 598 A.2d 163,166 (D.C. 1991). (March 27, 2017).
[23] Transmittal Date reflects as of August 27, 2012 for the 2012 DPM Version, and the 2016 Transmittal Date is as of February 26, 2016.
[24] *Id.*
[25] *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 10, 2010).
[26] *Id.*
[27] 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).
[28] DPM §1607.2(b) (2016)

for violation of DPM §1603.3(c), and DPM §1603.3(f) (6)[29] both range of Suspension for 15 Days.[30] The penalty in the TIA reflects that a first occurrence for false statements in connection DPM § 1605.4(b)(2), is reprimand to removal, and for §1605.4(b)(4), the range is a seven day (7) suspension to removal. Wherefore, the undersigned finds that Agency's assessment of the fifteen (15) day penalty for each charge fell into the range of penalties under both versions of the DPM. Thus, the undersigns find that while Agency improperly utilized the 2016 DPM given that misconduct occurred at the time the 2012 DPM was effective, that this error did not cause "substantial harm or prejudice" to Employee, and did not affect its final decision to take action in the instant matter.

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was assessed two (2) fifteen days suspensions pursuant to: DPM § 1605.4(b)(2) – "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter."; and DPM 1605.2(f)(2) –"False statements, including knowing and willfully reporting false and misleading information or purposely omitting facts to any supervisor."

Charge 1- DPM § 1605.4(b) (2) – "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter."

OEA has held, that to sustain a falsification charge, that "agency must prove by preponderant evidence that employee knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency.[31] In sustaining the aforementioned charge upon Employee,

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[29] DPM §1603.3(c) – "Any knowing or negligent material misrepresentation on other document given to government agency; DPM §1603.3(f) (6) – Any on-duty or employment-related act or omission that interfere with the efficiency and integrity of government – misfeasance." Misfeasance, as described by the DPM includes: careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized uses of government resources; using or authorizing the use of government resources for other than official business. The undersigned relies on this comparison of the DPM because Agency relied on these causes of actions in its Supplement Brief submitted on March 27, 2017.

[30] 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

[31] *John J. Barbudsin v Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), *citing Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002); *Guerrero v. Department of Veteran Affairs*, 105 M.S.P.R. 617 (2007); *See also Raymond v. Department of the Army*, 34 M.S.P.R. 476 (1987).

Agency considered and was ultimately "unpersuaded", with "Employee's assertion that she had verbal permission to alter the parts of FMLA form or return to work notice."[32] Agency determined that the charge should be sustained because of Employee's admittance of "whiting out" and changing the forms on two (2) previous occasions.[33] However, during the Evidentiary Hearing held in this matter on October 17, 2017, Dr. Safa Rifka, Employee's physician, corroborated Employee's assertions, as he confirmed that he provided Employee with verbal consent to extend her return to work until December 8, 2015; and that he gave permission to redact any items that may violate Employee's privacy protections.[34] Without going into the personal and private nature of Employee's condition, the doctor explained that the type of procedure Employee underwent could result in up to four (4) weeks of recovery time.[35] Further, Dr. Rifka explained that any patient had the right to redact any information of a private nature and that he gave verbal permission to Employee to redact private information.[36]

During the course of the Evidentiary Hearing, I had the opportunity to listen to the testimony provided by Dr. Rifka and found his testimony to be credible. Further, the undersigned finds it significant that Agency rescinded the charge of AWOL once it received confirmation in February 2016 that Employee's return to work date was in fact extended until December 8, 2015.[37] The undersigned finds that this also supports Employee's claim that she had verbal permission to alter the return to work form to reflect December 8, 2015. In assessing this adverse action, Agency maintained it was unpersuaded by Employee's claims of having received verbal consent from her physician. Upon consideration of the aforementioned findings and the documentary and testimonial evidence set forth in the record, I find that Agency has not met its burden of proof by a preponderance of evidence with regard to this cause of action.

Charge 2 -DPM 1605.2(f) (2) –"False statements, including knowingly and willfully reporting false and misleading information or purposely omitting facts to any supervisor."

In considering this cause of action, Agency again attested that it was unpersuaded by Employee's assertion that she received verbal consent to alter the documents. Specifically, Agency cited that Employee provided false statements to Ms. Hernandez, during the course of the internal investigation. Agency noted that this charge was distinguished with regard to the changes made in the "medical incapacity" section of the form. Agency found that Employee changed the document that was signed by Dr. Sarhan (surgeon) on November 2, 2015. In particular, Agency cited that the document received on February 9, 2016 from Dr. Sarhan reflected the estimated medical incapacity as November 10, 2015 through November 17, 2015. Employee's submissions of these same documents contained a medical incapacity date of November 10, 2015, through December 10, 2015. Upon consideration of the record, the undersigned finds that there is not substantive evidence to support Employee's claim that she was given the verbal consent to change the medical incapacity date in the forms. Further, the medical incapacity listed in the documentation submitted by Employee in November 2015, does not correspond with the medical record that bears the same signature date (November 2, 2015) that was received by fax directly from the office on February 9, 2016. Consequently, the undersigned finds that Agency has met its burden by preponderant evidence and has adequately proven that there was cause for action with regard to this charge.

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[32] Agency Answer at Page 8 (July 8, 2016).
[33] *Id.*
[34] *See.* Evidentiary Hearing Transcript (Tr.) held October 17, 2017 at Pages 13, 22-37.
[35] *Id.* at page 26.
[36] *Id.* at Page 30
[37] Received in accordance with directive in Final agency Action and was signed by the surgeon, Dr. Abba Sarhan.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency's action with regard to the charge of false statements pursuant to DPM 1605.2(f) (2) –"False statements, including knowingly and willfully reporting false and misleading information or purposely omitting facts to any supervisor" was taken for cause, and as such Agency can rely on this charge in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[38] According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[39] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[40]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.[41] Further, Chapter 16 § 1607.1(b)(2)(4) of the District Personnel Manual Table of Illustrative Actions

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[38] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[39] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

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

[41] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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;
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 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;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) 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;
10) potential for the employee's rehabilitation;
11) 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
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

("TIA") provides that the appropriate penalty for a first occurrence for a charge of violating DPM 1604.5(b)(4) ranges from "7-day Suspension to Removal."[42] Wherefore, the undersigned finds that Agency properly exercised its discretion and its chosen penalty of a fifteen (15) suspension is reasonable under the circumstances and not a clear error of judgement.

With regard to the false statements charge pursuant to DPM §1605.4(b)(2); the undersigned finds, for the reasons previously cited, that Agency did not meet its burden to establish a cause for adverse action for "False statements, including misrepresentation, falsification, or concealment of material facts or records in connection with an official matter." As a result, I find that the penalty of the fifteen (15) day suspension was not appropriate. Consequently, I conclude that Agency's action should be upheld, in part, and reversed in part.

ORDER

Based on the foregoing it is hereby **ORDERED that:**

1. Agency's action of suspending Employee from service for fifteen (15) days with regard to Charge 2 is hereby **UPHELD.**
2. Agency's action of suspending Employee from service for fifteen (15) days with regard to Charge 1 is hereby **REVERSED;** and Agency shall reimburse employee all pay and benefits lost as a result of this suspension.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

[42] Table of Illustrative Actions 2016. It should be noted that under the 2012 DPM Table of Appropriate Penalties ("TAP"), the penalty for this cause of action on a first offense is Suspension for 15 days see Chapter 16 §1619.1.

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, 955 L'Enfant Plaza Suite 2500, 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** was sent by regular mail on this day to:

Charis Toney
7701 Starshine Drive
District Heights, MD 20747

Darnise Henry Bush
2703 Shipley Terrace, SE
#4
Washington, DC 20020

Mark D. Back., Esq.
General Counsel
DC Department on Disability Services
One Independence Square
250 E Street, SW, Sixth Floor
Washington, DC 20024

Katrina Hill
Clerk

February 21, 2018
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

In the matter of:	)
PHILLIPPA MEZILE, **2020 12th Street, NW, Apt. 416** **Washington, DC 20009**	)
Petitioner,	)
v.	)
D.C. DEPARTMENT ON DISABILITY SERVICES, **250 E Street, SW** **Washington, DC 20024**	)
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 Phillippa Mezile ("Petitioner Mezile"), 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 Opinion and Order on Petition for Review issued on the 22nd day of March, 2018. A copy of the Order sought to be reviewed is attached to this petition as Exhibit A.

Petitioner Mezile worked as a Public Affairs Specialist with the Department on Disability Services (the "Agency"), and the Agency informed Petitioner Mezile that her position was being abolished as a result of a Reduction-in-Force ("RIF") on May 12, 2009. Ex. A at 1. Petitioner Mezile filed a Petition for Review with the D.C. Office of Employee Appeals ("OEA"), arguing

that the RIF violated District of Columbia laws, including by failing to provide her with the requisite thirty-day written notice prior to the effective date of the RIF. *Id.* The OEA dismissed the Petition for Review, and Petitioner Mezile filed a Petition for Review with the D.C. Superior Court on June 3, 2010. *Id.* at 2. The D.C. Superior Court found that the OEA's findings lacked substantial evidence. Specifically, the OEA failed to make a required finding supported by substantial evidence regarding whether Petitioner Mezile received thirty days' notice, whether the general RIF statute, § 1-624.02 or the Abolishment Act, § 1-624.08 applied to the RIF, and whether Petitioner Mezile had raised non-frivolous allegations challenging the RIF, including whether the RIF was a sham. Accordingly, the matter was remanded to the OEA for further consideration. *Id.* at 2-3. In an Initial Decision on Remand issued on October 10, 2012, the OEA found that Petitioner Mezile did not receive thirty days' notice of her termination pursuant to a RIF in violation of D.C. Code § 1-624.08 and ordered the Agency reimburse her for four days' of back pay and benefits, totaling $1,807.46, as a result of the Agency's failure to provide the statutorily mandated notice. *Id.* at 4. On November 14, 2016, Petitioner Mezile filed a Request for Compliance with the Initial Decision on Remand. *Id.* On January 6, 2017, the OEA issued an Addendum Decision on Compliance finding that the Agency had complied with the Initial Decision on Remand. *Id.* at 5.

Petitioner Mezile filed a Petition for Attorney's Fees and Costs with the OEA on February 6, 2017, which requested attorney's fees on behalf of Petitioner Mezile, as the prevailing party. *Id.* The amount requested consisted of attorneys' fees for this office to perform legal work before the OEA and the D.C. Superior Court, including efforts to collect the funds owed to Petitioner Mezile. *Id.* The OEA issued an Addendum Decision on Attorney's Fees on June 14, 2017, denying Petitioner's request for attorneys' fees and holding that Petitioner Mezile

only obtained a minimal amount of success and that the requested attorneys' fees were unreasonable and unwarranted in the interest of justice. *Id.* at 6. Petitioner Mezile filed a Petition for Review of Addendum Decision on Attorney's Fees with the OEA Board on July 19, 2017. *Id.* The OEA Board upheld the Addendum Decision denying Petitioner Mezile's request for attorneys' fees and finding that although Petitioner Mezile was the prevailing party, she received a limited degree of success and an award of attorneys' fees was unwarranted in the interest of justice. *Id.* at 12.

Petitioner Mezile hereby files this Petition for Review of the OEA Board's March 22, 2018 Opinion and Order on Petition for Review, denying her petition for attorneys' fees, despite finding that she was the prevailing party.

Address of Respondent Agencies or Officials:

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

D.C. Department on Disability Services
250 E Street, SW
Washington, DC 20024

Names and addresses of parties or attorneys to be served:

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Section Chief
Personnel and Labor Relations Section
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Washington, DC 20001

Karl A. Racine
Office of the Attorney General
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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

Respectfully submitted,

/s/ David A. Branch

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2018 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

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Respectfully submitted,

/s/ David A. Branch
David A. Branch

Exhibit A

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PHILLIPPA MEZILE, Employee	OEA Matter No. 2401-0158-09R12AF17
v.	Date of Issuance: March 22, 2018
DEPARTMENT ON DISABILITY SERVICES, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Phillippa Mezile ("Employee") worked as a Public Affairs Specialist with the Department on Disability Services ("Agency"). On May 12, 2009, Agency informed Employee that her position was being abolished as a result of a Reduction-in-Force ("RIF"). The effective date of the RIF was June 12, 2009. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 10, 2009. She argued, *inter alia*, that the RIF violated District of Columbia laws and that Agency failed to provide her with the requisite thirty-day written notice prior to the effective date of the RIF.[1] In its answer, Agency denied Employee's claims and provided that her position was abolished because of a shortage of funds for the 2010 fiscal year. Agency also contended that its RIF action complied with all applicable laws, rules,

[1] *Petition for Appeal* (July 10, 200).

and regulations.[2]

The OEA Administrative Judge ("AJ") assigned to the matter held a prehearing conference on March 24, 2010.[3] The parties were subsequently ordered to submit briefs addressing whether Agency's RIF action should be upheld. The AJ issued an Initial Decision on April 2, 2010. He first noted that Agency issued an Administrative Order on April 23, 2009, stating that several positions were identified for abolishment as a result of realignment and a shortage of funds for the 2010 fiscal year. Next, the AJ stated that D.C. Official Code § 1-624.08 was the applicable RIF statute and that Employee was limited to contesting whether she was afforded one round of lateral competition and whether Agency provided her with thirty days' written notice prior to the effective date of the RIF. Lastly, the AJ dismissed Employee's collateral arguments relating to discrimination and pre-RIF conditions. Consequently, Agency's RIF action was upheld.[4]

Employee disagreed with the AJ and filed a Petition for Review in D.C. Superior Court on June 3, 2010. In her appeal, Employee argued that the AJ's finding that she received thirty days' written notice was not based on substantial evidence; the AJ failed to address her claim that the RIF was conducted under D.C. Official Code § 1-624.02, rather than D.C. Official Code § 1-624.08; the AJ failed to properly consider her argument that Agency violated the RIF procedures; and the AJ failed to discuss whether the RIF was a sham because it was conducted for discriminatory reasons. In its Order, the Court agreed with the AJ's conclusion that OEA was the wrong venue for adjudicating Employee's discrimination claims. However, the Court provided that the AJ should have made a finding pertinent to Employee's claim that the RIF action was a "sham" based on her arguments that were unrelated to discrimination. Accordingly,

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[2] *Agency's Answer to Petition for Appeal* (August 13, 2009).
[3] *Order Scheduling a Prehearing Conference* (February 25, 2010).
[4] *Initial Decision* (April 2, 2010).

the matter was remanded to the AJ for further consideration.[5]

The AJ held a status conference on March 23, 2012. He subsequently issued an Initial Decision on Remand on October 10, 2012. With respect to the appropriate statute to utilize in conducting the RIF, the AJ stated that although Agency authorized the RIF pursuant to D.C. Official Code § 1-624.02, D.C. Official Code § 1-624.08 was the more applicable statute in this case. In support thereof, he highlighted the holding in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123 (D.C. 2008), in which the D.C. Court of Appeals stated that a RIF conducted for budgetary reasons triggered the Abolishment Act instead of the normal RIF procedures enumerated in § 1-624.02. The Abolishment Act created a more streamlined process for conducing RIFs during times of fiscal emergencies. Accordingly, the AJ concluded that the instant RIF was conducted as a result of budgetary restraints and that D.C. Official Code § 1-624.08 was the appropriate statute to utilize in this case.

With respect to the lateral competition requirement, the AJ stated that OEA has consistently held that when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e) is inapplicable. Thus, Agency was not required to afford Employee with one round of lateral competition because she was the sole Public Affairs Specialist, DS-1035-13-01-N, in her competitive level. The AJ dismissed Employee's claims that there was not a Mayoral Order which authorized and approved the RIF. He further categorized Employee's other arguments as "bare allegations" that were void of supporting proof. Additionally, the AJ opined that an evidentiary hearing was unwarranted to validate the truthfulness of Agency's statements pertaining to its need to conduct a RIF.

Regarding the notice requirement, the AJ provided that Title 5, Section 1506 of the D.C. Municipal Regulations ("DCMR") states that employees selected for separation from service

[5] *Mezile v. D.C. Department on Disability Services*, 2010 CA 004111 P(MPA) (D.C. Super. Ct. February 2, 2012).

shall be given specific written notice at least thirty days prior to the effective date of separation. Moreover, he noted that D.C. Official Code § 1-624.08(e) requires an agency to provide affected employees with thirty days' written notice prior to the effective date of the RIF. In this case, Employee admitted to receiving Agency's RIF notice on May 18, 2009. The notice reflected an effective date of June 12, 2009. Accordingly, both the AJ and the parties conceded that Employee only received twenty-six days' notice prior to the effective date of the RIF. Citing District Personnel Manual ("DPM") § 2405.6, the AJ found that Agency's failure to provide Employee with adequate notice was considered a procedural error and that retroactive reinstatement was not appropriate under the circumstances. Therefore, the AJ determined that the RIF was conducted in accordance with D.C. Official Code § 1-624.08. However, he ordered Agency to reimburse Employee for four days' of back pay and benefits as a result of Agency's notice error.[6]

On November 14, 2016, Employee, without the assistance of her attorney, filed a Request for Compliance with Initial Decision on Remand. Employee requested that the AJ order Agency reimburse her with back pay and benefits for four days, as required in the Initial Decision on Remand.[7] In its response, Agency stated that it forwarded to the District of Columbia Office of Pay and Retirement Services ("OPRS") a request to issue Employee a check in the amount of $1,807.46, less any applicable federal and District tax withholdings. It provided that the request would be processed and that a check was expected to be issued and mailed to Employee within two to three weeks. Thus, Agency maintained that it had taken all of the necessary steps to

[6] *Initial Decision* (October 10, 2012). Employee appealed to D.C. Superior Court a second time; however, her appeal was denied. Employee then filed an appeal with the D.C. Court of Appeals, who affirmed OEA's Initial Decision on Remand. *See Mezile v. D.C. Department of Disability Services*, 117 A.3d 1042 (D.C. 2015).
[7] *Request for Compliance with Initial Decision on Remand* (November 11, 2016).

comply with the Initial Decision on Remand.[8] On January 6, 2017, the AJ issued an Addendum Decision on Compliance. He stated that Agency complied with the Initial Decision on Remand and Employee's motion for compliance was dismissed.[9]

Thereafter, Employee filed a Petition for Attorney's Fees and Costs with OEA on February 6, 2017. In her petition, Employee requested $48,347.50 in attorney's fees and $100 in costs. The amount included legal work performed by Attorney David A. Branch before OEA, D.C. Superior Court, and efforts to collect the funds owed to Employee.[10] Agency's response to the motion argued that an award of attorney's fees was not appropriate because Employee was not the prevailing party in this matter. It further reasoned that an award of fees was not warranted in the interest of justice. Therefore, Agency asserted that Employee's request was without merit and requested that the AJ deny her motion.[11]

The AJ issued an Addendum Decision on Attorney's Fees on June 14, 2017. He first highlighted the holding in *Zervas v. District of Columbia Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993), which held that that the initial criterion for fee eligibility is that the employee be the prevailing party on the final decision on the merits of the case. The AJ also noted that the U.S. Supreme Court in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), held that a plaintiff prevails "when the actual relief on the merits of his claim materially alters the legal relationship between parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." According to the AJ, the relief that Employee sought was the reversal of Agency's RIF action; reinstatement to her previous position of record; and back pay and

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[8] *Agency's Response to Employee's Request for Compliance* (December 12, 2016). On January 4, 2017, Agency filed with OEA a Report on Compliance, stating that a check was issued to Employee on December 13, 2016, in the after-tax amount of $1,153.43. Agency attached a copy of the paystub to its submission.
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benefits. While Employee did not receive the total relief that she sought because Agency's RIF action was ultimately upheld, she did receive an award of four days' worth of back pay and benefits because of Agency's failure to provide adequate notice of the RIF. Thus, the AJ opined that Employee obtained "an actual, if nominal, relief on the merit[s] of her claim that she was not given the full thirty-day notice required by law." He further stated that Agency's failure to comply with the notice requirements altered the legal relationship between the parties because Employee received some form of direct benefit.

With respect to whether the payment of attorney's fees was warranted in the interest of justice, the AJ again referenced the holding in *Farrar*, which recognized that "the degree of the plaintiff's overall success goes to the success the reasonableness of the fee award." He concluded that Employee only obtained a minimal amount of success because she received compensation for four days' worth of back pay instead of a reversal of the RIF. Considering that Employee requested attorney's fees and costs in the amount of $48,347.50 after obtaining an award of approximately $1,800, the AJ opined that a fee award was unreasonable and unwarranted in the interest of justice. Therefore, her petition for attorney's fees was denied.[12]

Employee subsequently filed a Petition for Review of Addendum Decision on Attorney's Fees with the OEA Board on July 19, 2017. Employee argues that the AJ erred in finding that she was not entitled to any attorney's fees for appealing the April 2, 2010 Initial Decision to D.C. Superior Court. She also contends that the AJ failed to show special circumstances which would make an award of fees unjust and opines that the case law relied upon by the AJ in rendering his decision is misplaced. Additionally, Employee states that the AJ incorrectly characterized her recovery of $1,807.46 in back pay as nominal damages to justify the refusal of attorney's fees. According to Employee, the fees requested are reasonable and exclude fees incurred in appealing

[12] *Addendum Decision on Compliance* (January 6, 2017).

this matter to the D.C. Court of Appeals. As a result, she requests that OEA's Board grant her Petition for Review and order Agency to pay fees and costs in the amount of $48,347.50.[13]

In response, Agency submits that the AJ correctly determined that that an award of attorney's fees to Employee was not warranted in the interest of justice. Agency states that it did not engage in a prohibited personnel practice and that its RIF action was conducted in good faith. It further reasons that the amount of Employee's fee request is unreasonable in comparison to the amount of back pay she actually received. Finally, Agency states that the statutory language of D.C. Official Code § 1-606.08 makes the award of attorney's fees discretionary, not mandatory. Consequently, it asks this Board to deny Employee's Petition for Review.[14]

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals 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.[15] Under OEA Rule 628.1, 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.

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[13] *Petition for Review of Addendum Decision on Attorney Fees* (July 19, 2017)
[14] *Agency's Response to Employee's Petition for Review* (August 23, 2017).
[15] *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).

Prevailing Party

D.C. Official Code § 1-606.08 provides that an OEA Administrative Judge "...may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice."[16] OEA has previously relied on its ruling in *Zervas supra* and the Merit Systems Protection Board's ("MSBP") holding in *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371 (1980), which held that "for an employee to be a prevailing party, he must obtain all or a significant part of the relief sought...."[17] However, the holding in *Hodnick* was overruled by the MSPB in *Ray v. Department of Health and Human Services*, 64 M.S.P.R. 100 (1994). In *Ray*, the MSPB adopted the U.S. Supreme Court's holding in *Farrar v. Hobby*, 506 U.S. 103 (1992), for the purpose of determining the prevailing party within the context of the Civil Service Reform Act of 1978. Pursuant to the standard established in *Ray*, "...to qualify as a prevailing party, a...plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought...or comparable relief through a consent decree or settlement." Further, in *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), the D.C. Court of Appeals noted that "[g]enerally speaking the term 'prevailing party' is understood to mean a party 'who has been awarded some relief by the court' (or other tribunal)...."[18]

In this case, Employee did not receive the original relief she requested in her Petition for Appeal, which was the reversal of the RIF and reinstatement to her previous position with back

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[16] *See* OEA Rule 634.

[17] *See also Edwards v. Department of Youth and Rehabilitation Services*, OEA Matter No. 1601-0017-06AF-10 (December 17, 2012); *Ross v. Office of Contracting and Procurement*, OEA Matter No. 2401-0133-09R11AF14 (September 20, 2014); *Fogle v. D.C. Public Schools*, OEA Matter No. 2401-0123-04-AF10 (March 21, 2011); and *Bey v. Department of Parks and Recreation*, OEA Matter No. 1601-0118-02AF08 (September 14, 2009).

[18] *See also Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (holding that the prevailing party need only "succeed on any issue in the litigation which achieves some of the benefit he sought in bringing the action."

pay and benefits. However, Agency committed a procedural error by virtue of its non-compliance with D.C. Official Code §1-624.08(e) because it did not provide Employee with thirty days' written notice of the RIF. As a result, Employee was entitled to a judgment of four days in back pay and benefits, totaling approximately $1,800. While this is not the full amount of recovery that Employee would have been entitled to if she prevailed on the substantive merits of her arguments, she was nonetheless successful on at least one of her claims. Accordingly, under the holdings in *Farrar* and *Ray*, Employee is considered the prevailing party in this matter. Therefore, we will not disturb the AJ's ruling regarding such.

Interest of Justice

The central issue presented to this Board is whether there is substantial evidence to support the AJ's conclusion that the award of attorney's fees was unwarranted in the interest of justice. To determine whether a fee award is merited, OEA relies on *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), in which the MSPB provided circumstances to serve as "directional markers towards the 'interest of justice,' a destination which, at best, can only be approximate." The circumstances that should be considered are:

1. Whether the agency engaged in a "prohibited personnel practice;"
2. Whether the agency's action was "clearly without merit" or was "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;
3. Whether the agency initiated the action against the employee in "bad faith," including:
    a. Where the agency's action was brought to "harass" the employee;
    b. Where the agency's action was brought to "exert pressure on the employee to act in certain ways";

4. Whether the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";

5. Whether the agency "knew or should have known that it would not prevail on the merits," when it brought the proceeding.[19]

The U.S. Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), held that the most critical factor in determining the reasonableness of an attorney's fee award is the degree of success obtained, since a requested fee based on the hours expended on the litigation as a whole may be deemed excessive if a plaintiff achieves only partial or limited success. In cases where a party is only partially successful, the trial court must exercise its discretion to determine what amount of fees, if any, should be awarded.[20] Hence, the determination that an employee is the prevailing party "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."[21] In *Shore v. Groom Law Grp.*, 877 A.2d 86 (D.C. 2005), the D.C. Court of Appeals determined that the denial of an attorney's fee request was appropriate when the plaintiff was only successful on one of her eight claims against a former employee and received limited relief as a result. Accordingly, it is possible for a plaintiff to establish prevailing party status and not receive an award of attorney's fees.

This Board finds that the AJ did not abuse his discretion in denying Employee's petition for attorney's fees. We further conclude that Employee has failed to establish the existence of any of the *Allen* factors that would warrant an award of fees in the interest of justice.[22] First, there is no evidence in the record to support a finding that Agency engaged in a prohibited personnel practice. In his Initial Decision on Remand, the AJ upheld Agency's RIF action and

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[19] *Allen* at 434-35.
[20] *Fleming v. Carroll Publ'g Co.*, 581 A.2d 1219 (D.C. 1990).
[21] *Hensley* at 436.
[22] *See Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007) (holding that the scope of the Court's review [of an award of attorney's fees] was a limited one because the disposition of attorney's fee motions "is firmly committed to the informed discretion of the trial court" and requires "a very strong showing of abuse of discretion to set aside the decision of the trial court."(citing *Maybin v. Stewart*, 885 A.2d 284, 288 (D.C. 2005)).

made specific findings of fact and conclusions of law on each of Employee's arguments. He found that the RIF was properly authorized; that Employee was correctly placed in a single-person competitive level; and that she was not entitled to one round of lateral competition. Next, there was no credible proof that Agency's RIF action was clearly without merit or initiated in bad faith. Likewise, there is no indication that Agency knew or should have known that it would not prevail on the merits when it initiated the RIF.

However, it bears noting that the relief Employee was granted in this case was a result of Agency's failure to provide her with thirty days' written notice as required by D.C. Official Code §1-624.08. Thus, we must determine whether Agency's procedural error warrants the award of attorney's fees. Under *Allen* factor number four, to determine whether a "gross procedural error" occurred warranting an award of attorney fees in the interest of justice, a balance must be struck between the nature of and any excuse for the agency's error and the prejudice and burden that error caused the appellant.[23] If, in the balance, the prejudice and burden to the appellant predominates, gross procedural error exists and the appellant is entitled to a fee award.[24]

In this case, the Employee received twenty-six days' notice prior to the effective date of the RIF. The May 12, 2009 letter stated that Employee could appeal the RIF to OEA and included a copy of the appeal form and OEA's rules.[25] Employee subsequently filed a timely appeal with this Office to contest her separation from service. While it is unclear why Agency's RIF notice was received by Employee four days late, we do not believe that the deficiency constitutes a gross procedural error. The lack of timely notice did not require that Employee be retroactively reinstated to her position, nor did Employee provide proof that she was severely

[23] *See Woodall v. Federal Energy Regulatory Commission*, 33 M.S.P.R. 127 (1987).
[24] *Swanson v. Def. Logistics Agency*, 35 M.S.P.R. 115 (1987).
[25] *Petition for Appeal* (July 10, 2009).

prejudiced by Agency's delay.[26] Employee was able to adequately prosecute her appeal before this Office and her substantive due process rights were not adversely affected. Consequently, this Board concludes that *Allen* factor number four does not warrant an award of attorney's fees.

Conclusion

Based on the foregoing, we find that the AJ's Addendum Decision on Attorney's Fees is supported by substantial evidence. D.C. Official Code § 1-606.08 provides an AJ of this Office the discretion to award reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice. While Employee is the prevailing party in this case, attorney's fees are not warranted in the interest of justice. Employee achieved a limited degree of success in the prosecution of her appeal. The original relief sought—reversal of the RIF action with back pay and benefits—was not attained. Thus, a request for attorney's fees in the amount of $48,347.50 is unreasonable in relation to the $1,800.00 that Employee was awarded. Consequently, Employee's Petition for Review must be denied.

[26] *See* DPM 2405.7, 47 D.C. Reg. 2430 (2000). This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."

ORDER

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

FOR THE BOARD:

Sheree L. Price

Sheree L. Price, Chair

Vera M. Abbott

Vera M. Abbott

Patricia Hobson Wilson

Patricia Hobson Wilson

P. Victoria Williams

P. Victoria Williams

Selani 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:

Philippa Mezile
2020 12th Street, NW
#416
Washington, DC 20009

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

David A. Branch
1828 L Street, NW Suite 820
Washington, DC 20036

Katrina Hill
Clerk

March 22, 2018
Date

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

PHILLIPPA MEZILE, Petitioner, v. D.C. DEPARTMENT ON DISABILITY SERVICES et al., Respondents.	Case No. 2018 CA 002820 P(MPA) Judge John M. Mott

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Phillippa Mezile v. Department on Disability Services,* OEA Matter No. 2401-0158-09R12AF17. The record consists of one volume containing forty-three (43) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

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

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PHILLIPPA MEZILE, Petitioner	Case No. 2018 CA 002820 P(MPA)
v.	Judge Kelly Higashi
DEPARTMENT ON DISABILITY SERVICES, et al., Respondent.	**Next Event: Status Hearing** **January 18, 2019 at 10:30 a.m.**

OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on September 28, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Phillippa Mezile v. Department on Disability Services*, OEA Matter Number 2401-0158-09R12AF17 (March 22, 2018), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2018, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Charles Frye
Counsel for Respondent

David A. Branch
Counsel for Petitioner

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PHILLIPPA MEZILE, Employee	OEA Matter No. 2401-0158-09R12AF17
v.	Date of Issuance: March 22, 2018
DEPARTMENT ON DISABILITY SERVICES, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Phillippa Mezile ("Employee") worked as a Public Affairs Specialist with the Department on Disability Services ("Agency"). On May 12, 2009, Agency informed Employee that her position was being abolished as a result of a Reduction-in-Force ("RIF"). The effective date of the RIF was June 12, 2009. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 10, 2009. She argued, *inter alia*, that the RIF violated District of Columbia laws and that Agency failed to provide her with the requisite thirty-day written notice prior to the effective date of the RIF.[1] In its answer, Agency denied Employee's claims and provided that her position was abolished because of a shortage of funds for the 2010 fiscal year. Agency also contended that its RIF action complied with all applicable laws, rules,

[1] *Petition for Appeal* (July 10, 200).

and regulations.[2]

The OEA Administrative Judge ("AJ") assigned to the matter held a prehearing conference on March 24, 2010.[3] The parties were subsequently ordered to submit briefs addressing whether Agency's RIF action should be upheld. The AJ issued an Initial Decision on April 2, 2010. He first noted that Agency issued an Administrative Order on April 23, 2009, stating that several positions were identified for abolishment as a result of realignment and a shortage of funds for the 2010 fiscal year. Next, the AJ stated that D.C. Official Code § 1-624.08 was the applicable RIF statute and that Employee was limited to contesting whether she was afforded one round of lateral competition and whether Agency provided her with thirty days' written notice prior to the effective date of the RIF. Lastly, the AJ dismissed Employee's collateral arguments relating to discrimination and pre-RIF conditions. Consequently, Agency's RIF action was upheld.[4]

Employee disagreed with the AJ and filed a Petition for Review in D.C. Superior Court on June 3, 2010. In her appeal, Employee argued that the AJ's finding that she received thirty days' written notice was not based on substantial evidence; the AJ failed to address her claim that the RIF was conducted under D.C. Official Code § 1-624.02, rather than D.C. Official Code § 1-624.08; the AJ failed to properly consider her argument that Agency violated the RIF procedures; and the AJ failed to discuss whether the RIF was a sham because it was conducted for discriminatory reasons. In its Order, the Court agreed with the AJ's conclusion that OEA was the wrong venue for adjudicating Employee's discrimination claims. However, the Court provided that the AJ should have made a finding pertinent to Employee's claim that the RIF action was a "sham" based on her arguments that were unrelated to discrimination. Accordingly,

[2] *Agency's Answer to Petition for Appeal* (August 13, 2009).
[3] *Order Scheduling a Prehearing Conference* (February 25, 2010).
[4] *Initial Decision* (April 2, 2010).

the matter was remanded to the AJ for further consideration.[5]

The AJ held a status conference on March 23, 2012. He subsequently issued an Initial Decision on Remand on October 10, 2012. With respect to the appropriate statute to utilize in conducting the RIF, the AJ stated that although Agency authorized the RIF pursuant to D.C. Official Code § 1-624.02, D.C. Official Code § 1-624.08 was the more applicable statute in this case. In support thereof, he highlighted the holding in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123 (D.C. 2008), in which the D.C. Court of Appeals stated that a RIF conducted for budgetary reasons triggered the Abolishment Act instead of the normal RIF procedures enumerated in § 1-624.02. The Abolishment Act created a more streamlined process for conducing RIFs during times of fiscal emergencies. Accordingly, the AJ concluded that the instant RIF was conducted as a result of budgetary restraints and that D.C. Official Code § 1-624.08 was the appropriate statute to utilize in this case.

With respect to the lateral competition requirement, the AJ stated that OEA has consistently held that when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e) is inapplicable. Thus, Agency was not required to afford Employee with one round of lateral competition because she was the sole Public Affairs Specialist, DS-1035-13-01-N, in her competitive level. The AJ dismissed Employee's claims that there was not a Mayoral Order which authorized and approved the RIF. He further categorized Employee's other arguments as "bare allegations" that were void of supporting proof. Additionally, the AJ opined that an evidentiary hearing was unwarranted to validate the truthfulness of Agency's statements pertaining to its need to conduct a RIF.

Regarding the notice requirement, the AJ provided that Title 5, Section 1506 of the D.C. Municipal Regulations ("DCMR") states that employees selected for separation from service

[5] *Mezile v. D.C. Department on Disability Services*, 2010 CA 004111 P(MPA) (D.C. Super. Ct. February 2, 2012).

shall be given specific written notice at least thirty days prior to the effective date of separation. Moreover, he noted that D.C. Official Code § 1-624.08(e) requires an agency to provide affected employees with thirty days' written notice prior to the effective date of the RIF. In this case, Employee admitted to receiving Agency's RIF notice on May 18, 2009. The notice reflected an effective date of June 12, 2009. Accordingly, both the AJ and the parties conceded that Employee only received twenty-six days' notice prior to the effective date of the RIF. Citing District Personnel Manual ("DPM") § 2405.6, the AJ found that Agency's failure to provide Employee with adequate notice was considered a procedural error and that retroactive reinstatement was not appropriate under the circumstances. Therefore, the AJ determined that the RIF was conducted in accordance with D.C. Official Code § 1-624.08. However, he ordered Agency to reimburse Employee for four days' of back pay and benefits as a result of Agency's notice error.[6]

On November 14, 2016, Employee, without the assistance of her attorney, filed a Request for Compliance with Initial Decision on Remand. Employee requested that the AJ order Agency reimburse her with back pay and benefits for four days, as required in the Initial Decision on Remand.[7] In its response, Agency stated that it forwarded to the District of Columbia Office of Pay and Retirement Services ("OPRS") a request to issue Employee a check in the amount of $1,807.46, less any applicable federal and District tax withholdings. It provided that the request would be processed and that a check was expected to be issued and mailed to Employee within two to three weeks. Thus, Agency maintained that it had taken all of the necessary steps to

[6] *Initial Decision* (October 10, 2012). Employee appealed to D.C. Superior Court a second time; however, her appeal was denied. Employee then filed an appeal with the D.C. Court of Appeals, who affirmed OEA's Initial Decision on Remand. *See Mezile v. D.C. Department of Disability Services*, 117 A.3d 1042 (D.C. 2015).
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[12] *Addendum Decision on Compliance* (January 6, 2017).

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In response, Agency submits that the AJ correctly determined that that an award of attorney's fees to Employee was not warranted in the interest of justice. Agency states that it did not engage in a prohibited personnel practice and that its RIF action was conducted in good faith. It further reasons that the amount of Employee's fee request is unreasonable in comparison to the amount of back pay she actually received. Finally, Agency states that the statutory language of D.C. Official Code § 1-606.08 makes the award of attorney's fees discretionary, not mandatory. Consequently, it asks this Board to deny Employee's Petition for Review.[14]

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals 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.[15] Under OEA Rule 628.1, 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.

[13] *Petition for Review of Addendum Decision on Attorney Fees* (July 19, 2017)
[14] *Agency's Response to Employee's Petition for Review* (August 23, 2017).
[15] *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).

Prevailing Party

D.C. Official Code § 1-606.08 provides that an OEA Administrative Judge "...may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice."[16] OEA has previously relied on its ruling in *Zervas supra* and the Merit Systems Protection Board's ("MSBP") holding in *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371 (1980), which held that "for an employee to be a prevailing party, he must obtain all or a significant part of the relief sought...."[17] However, the holding in *Hodnick* was overruled by the MSPB in *Ray v. Department of Health and Human Services*, 64 M.S.P.R. 100 (1994). In *Ray*, the MSPB adopted the U.S. Supreme Court's holding in *Farrar v. Hobby*, 506 U.S. 103 (1992), for the purpose of determining the prevailing party within the context of the Civil Service Reform Act of 1978. Pursuant to the standard established in *Ray*, "...to qualify as a prevailing party, a...plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought...or comparable relief through a consent decree or settlement." Further, in *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), the D.C. Court of Appeals noted that "[g]enerally speaking the term 'prevailing party' is understood to mean a party 'who has been awarded some relief by the court' (or other tribunal)...."[18]

In this case, Employee did not receive the original relief she requested in her Petition for Appeal, which was the reversal of the RIF and reinstatement to her previous position with back

[16] *See* OEA Rule 634.
[17] *See also Edwards v. Department of Youth and Rehabilitation Services*, OEA Matter No. 1601-0017-06AF-10 (December 17, 2012); *Ross v. Office of Contracting and Procurement*, OEA Matter No. 2401-0133-09R11AF14 (September 20, 2014); *Fogle v. D.C. Public Schools*, OEA Matter No. 2401-0123-04-AF10 (March 21, 2011); and *Bey v. Department of Parks and Recreation*, OEA Matter No. 1601-0118-02AF08 (September 14, 2009).
[18] *See also Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (holding that the prevailing party need only "succeed on any issue in the litigation which achieves some of the benefit he sought in bringing the action."

pay and benefits. However, Agency committed a procedural error by virtue of its non-compliance with D.C. Official Code §1-624.08(e) because it did not provide Employee with thirty days' written notice of the RIF. As a result, Employee was entitled to a judgment of four days in back pay and benefits, totaling approximately $1,800. While this is not the full amount of recovery that Employee would have been entitled to if she prevailed on the substantive merits of her arguments, she was nonetheless successful on at least one of her claims. Accordingly, under the holdings in *Farrar* and *Ray*, Employee is considered the prevailing party in this matter. Therefore, we will not disturb the AJ's ruling regarding such.

Interest of Justice

The central issue presented to this Board is whether there is substantial evidence to support the AJ's conclusion that the award of attorney's fees was unwarranted in the interest of justice. To determine whether a fee award is merited, OEA relies on *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), in which the MSPB provided circumstances to serve as "directional markers towards the 'interest of justice,' a destination which, at best, can only be approximate." The circumstances that should be considered are:

1. Whether the agency engaged in a "prohibited personnel practice;"

2. Whether the agency's action was "clearly without merit" or was "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;

3. Whether the agency initiated the action against the employee in "bad faith," including:

    a. Where the agency's action was brought to "harass" the employee;
    b. Where the agency's action was brought to "exert pressure on the employee to act in certain ways";

4. Whether the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";

5. Whether the agency "knew or should have known that it would not prevail on the merits," when it brought the proceeding.[19]

The U.S. Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), held that the most critical factor in determining the reasonableness of an attorney's fee award is the degree of success obtained, since a requested fee based on the hours expended on the litigation as a whole may be deemed excessive if a plaintiff achieves only partial or limited success. In cases where a party is only partially successful, the trial court must exercise its discretion to determine what amount of fees, if any, should be awarded.[20] Hence, the determination that an employee is the prevailing party "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."[21] In *Shore v. Groom Law Grp.*, 877 A.2d 86 (D.C. 2005), the D.C. Court of Appeals determined that the denial of an attorney's fee request was appropriate when the plaintiff was only successful on one of her eight claims against a former employee and received limited relief as a result. Accordingly, it is possible for a plaintiff to establish prevailing party status and not receive an award of attorney's fees.

This Board finds that the AJ did not abuse his discretion in denying Employee's petition for attorney's fees. We further conclude that Employee has failed to establish the existence of any of the *Allen* factors that would warrant an award of fees in the interest of justice.[22] First, there is no evidence in the record to support a finding that Agency engaged in a prohibited personnel practice. In his Initial Decision on Remand, the AJ upheld Agency's RIF action and

[19] *Allen* at 434-35.
[20] *Fleming v. Carroll Publ'g Co.*, 581 A.2d 1219 (D.C. 1990).
[21] *Hensley* at 436.
[22] *See Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007) (holding that the scope of the Court's review [of an award of attorney's fees] was a limited one because the disposition of attorney's fee motions "is firmly committed to the informed discretion of the trial court" and requires "a very strong showing of abuse of discretion to set aside the decision of the trial court."(citing *Maybin v. Stewart*, 885 A.2d 284, 288 (D.C. 2005)).

made specific findings of fact and conclusions of law on each of Employee's arguments. He found that the RIF was properly authorized; that Employee was correctly placed in a single-person competitive level; and that she was not entitled to one round of lateral competition. Next, there was no credible proof that Agency's RIF action was clearly without merit or initiated in bad faith. Likewise, there is no indication that Agency knew or should have known that it would not prevail on the merits when it initiated the RIF.

However, it bears noting that the relief Employee was granted in this case was a result of Agency's failure to provide her with thirty days' written notice as required by D.C. Official Code §1-624.08. Thus, we must determine whether Agency's procedural error warrants the award of attorney's fees. Under *Allen* factor number four, to determine whether a "gross procedural error" occurred warranting an award of attorney fees in the interest of justice, a balance must be struck between the nature of and any excuse for the agency's error and the prejudice and burden that error caused the appellant.[23] If, in the balance, the prejudice and burden to the appellant predominates, gross procedural error exists and the appellant is entitled to a fee award.[24]

In this case, the Employee received twenty-six days' notice prior to the effective date of the RIF. The May 12, 2009 letter stated that Employee could appeal the RIF to OEA and included a copy of the appeal form and OEA's rules.[25] Employee subsequently filed a timely appeal with this Office to contest her separation from service. While it is unclear why Agency's RIF notice was received by Employee four days late, we do not believe that the deficiency constitutes a gross procedural error. The lack of timely notice did not require that Employee be retroactively reinstated to her position, nor did Employee provide proof that she was severely

[23] *See Woodall v. Federal Energy Regulatory Commission*, 33 M.S.P.R. 127 (1987).
[24] *Swanson v. Def. Logistics Agency*, 35 M.S.P.R. 115 (1987).
[25] *Petition for Appeal* (July 10, 2009).

prejudiced by Agency's delay.[26] Employee was able to adequately prosecute her appeal before this Office and her substantive due process rights were not adversely affected. Consequently, this Board concludes that *Allen* factor number four does not warrant an award of attorney's fees.

Conclusion

Based on the foregoing, we find that the AJ's Addendum Decision on Attorney's Fees is supported by substantial evidence. D.C. Official Code § 1-606.08 provides an AJ of this Office the discretion to award reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice. While Employee is the prevailing party in this case, attorney's fees are not warranted in the interest of justice. Employee achieved a limited degree of success in the prosecution of her appeal. The original relief sought—reversal of the RIF action with back pay and benefits—was not attained. Thus, a request for attorney's fees in the amount of $48,347.50 is unreasonable in relation to the $1,800.00 that Employee was awarded. Consequently, Employee's Petition for Review must be denied.

[26] *See* DPM 2405.7, 47 D.C. Reg. 2430 (2000). This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."

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.

ORDER

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

FOR THE BOARD:

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CERTIFICATE OF SERVICE

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

Philippa Mezile
2020 12th Street, NW
#416
Washington, DC 20009

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

David A. Branch
1828 L Street, NW Suite 820
Washington, DC 20036

Katrina Hill
Clerk

March 22, 2018
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

BRENDAN J CASSIDY
Vs. C.A. No. 2018 CA 002756 P(MPA)
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

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 ELIZABETH WINGO
Date: April 23, 2018
Initial Conference: 9:30 am, Friday, July 27, 2018
Location: Courtroom A-47
515 5th Street NW
WASHINGTON, DC 20001

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

PETITION FOR REVIEW OF AGENCY DECISION

BRENDAN J. CASSIDY,
Petitioner,
1613 Calvert Rd., #6
College Park, Md. 20740

DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS
Respondent.
1155 L'Enfant Plaza
Suite 2500
Washington, D.C. 20024

Docket No.: 18-0002756 MPA

A. Notice

Notice is hereby given that Brendan J. Cassidy appeals to the Superior Court of the District of Columbia from the Opinion and Order on Petition for Review of the Board of the District of Columbia Office of Employee Appeals ("OEA") issued on the 2nd day of March, 2018. A copy of that Opinion and Order is attached to this petition.

In the Opinion and Order the OEA Board upheld the termination of Mr. Cassidy in a reduction-in-force ("RIF") the District of Columbia Public Schools ("DCPS") conducted on October 2, 2009.

Statement of Proceedings and Decision

The Office issued its Initial Decision on Remand in this case on May 28, 2015. Mr. Cassidy respectfully submits the following petition for Review of that Initial Decision on Remand.

Mr. Cassidy presented the Office with three claims.

The first claim is that given the objective evidence Mr. Cassidy presented that was applicable to several of the factors in DCPS's directions regarding how the RIF was to be

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS
Respondent.

18-0002756

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Mr. Cassidy presented the Office with three claims.

The first claim is that given the objective evidence Mr. Cassidy presented that was applicable to several of the factors in DCPS's directions regarding how the RIF was to be

conducted at each school, the scores of zero (0) and ten negative statements in the comments section of the Competitive Level Documentation Form (CLDF) the principal created at the time of the RIF are evidence of prejudice and abuse of discretion.

The second claim is that given the enrollment drop of approximately 100 students at McKinley the summer before the RIF, the unnecessary August 24, 2009, hiring of an eighth (8^{th}) English teacher is evidence that the principal used the RIF as a pretext to terminate Mr. Cassidy.

The third claim is that based on the OEA's finding that the statute that governs the RIF is the Abolishment Act, the one round of lateral competition central to the RIF should have been conducted pursuant to Chapter 24 of the District of Columbia Personnel Manual. It was not, and Mr. Cassidy was prejudiced and harmed by it.

Petitioner submits that there are three bases for his appeal.

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

II. The findings of the presiding official are not based on substantial evidence.

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

Nature of Relief Requested

Petitioner respectfully requests that the Court reverse the OEA Board's decision and Order that Petitioner be reinstated and made whole.

B. Address of Respondent Agency or Official:

Government of the District of Columbia
Office of Employee Appeals
955 L'Enfant Plaza
Suite 2500
Washington, D.C. 20024

Certificate of Service

I certify that on April 23, 2018, I sent a true and accurate copy of this document, Employee's Petition for Review of Agency Decision, via first class mail to:

Government of the District of Columbia
Office of Employee Appeals
955 L'Enfant Plaza
Suite 2500
Washington, D.C. 20024

Office of the Attorney General
of the District of Columbia
441 Fourth St., N.W.
Suite 600 South
Washington, D.C. 20001

Carl L. Turpin, Esq.
Assistant Attorney General
Office of the Attorney General
District of Columbia Public Schools
1200 First St., N.E.
10th Floor
Washington, D.C. 20002

Brendan Cassidy (*Pro se*)
4613 Calvert Rd., #6
College Park, MD 20740
(301) 779-8584

C. Names and Addresses of all other parties to the agency proceeding:

For Petitioner:

Brendan J. Cassidy
4613 Calvert Rd., Rd. #6
College Park, MD 20740

For Respondent:

District of Columbia Public Schools
1200 First St., N.E.
10th Floor
Washington, D.C. 20002

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

Brendan J. Cassidy
4613 Calvert Rd., Rd. #6
College Park, MD 20740

Government of the District of Columbia
Office of Employee Appeals
955 L'Enfant Plaza
Suite 2500
Washington, D.C. 20024

Carl L. Turpin, Esq.
Assistant Attorney General
District of Columbia Public Schools
1200 First St., N.E.
10th Floor
Washington, D.C. 20002

E. A copy of the agency opinion and order is attached.

Brendan Cassidy

Printed Name of Petitioner (*Pro se*)

Brendan Cassidy

Signature of Petitioner (*Pro se*)

Brendan Cassidy (*Pro se*)
4613 Calvert Rd., #6
College Park, MD 20740
(301) 779-8584

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDAN CASSIDY,	)	
Employee	)	OEA Matter No. 2401-0253-10R13R16
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON SECOND REMAND

This matter has been previously before the Office of Employee Appeals' ("OEA") Board. By way of background, Brendan Cassidy ("Employee") worked as an English teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

The Administrative Judge ("AJ") issued his Initial Decision on April 10, 2012.[2] In its July 2013 Opinion and Order, the OEA Board found that the AJ failed to consider all material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ

[1] *Petition for Appeal*, p. 6 (December 2, 2009).
[2] The AJ ruled that Agency's action was proper and consistent with processing RIFs. Moreover, he held that Employee was provided with the requisite thirty-day notice for a RIF action. Accordingly, he upheld the RIF against Employee. *Initial Decision* (April 10, 2012).

to consider Employee's arguments.[3]

On remand, the parties engaged in an extensive discovery process and an evidentiary hearing was held by the AJ. Of importance to note, was Employee's assertion that Agency failed to use D.C. Official Code § 1-624.08 and District Personnel Manual ("DPM") Chapter 24 when conducting the RIF action against him.[4] The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08, instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. However, the AJ improperly relied on Title 5, DCMR § 1503.2 *et al.* and 1503.1 when analyzing Employee's one round of lateral competition.[5]

Employee filed a Petition for Review on Remand on July 2, 2015. He contended that the AJ's decision failed to consider that Agency did not properly administer the RIF because of its use of Title 5, DCMR § 1503.2 *et al.*, instead of DPM Chapter 24.[6] On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provided that if DPM Chapter 24 should have been considered, it still complied with those requirements.[7] Accordingly, Agency requested that the OEA Board uphold the AJ's Initial Decision on Remand.[8]

On September 13, 2016, the OEA Board held that in accordance with *Webster Rogers, Jr.*

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[3] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13, p. 4-5, *Opinion and Order on Petition for Review* (July 31, 2013).
[4] *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law,* p. 40 and 62-70 (May 5, 2015).
[5] *Initial Decision on Remand* (May 28, 2015).
[6] *Petition for Review of Initial Decision on Remand* (July 2, 2015).
[7] Agency explained that the relevant section of DPM Chapter 24 requires that tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance be considered to determine if an employee is retained or released. It asserted that it considered all of these factors together. Therefore, its decision to RIF Employee was proper.
[8] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 5-11 (August 5, 2015). Employee filed a reply to Agency's Response to Petition for Review and made many of the same arguments presented in his Closing Brief and Petition for Review on Remand. *Employee's Reply to Agency's Response to Employee's Petition for Review of Initial Decision on Remand* (August 18, 2015).

v. D.C. Public Schools, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Accordingly, the matter was remanded to the AJ a second time, for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as required in D.C. Official Code § 1-624.08.[9]

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on whether Agency complied with DPM Chapter 24.[10] On October 24, 2016, Employee filed a Motion Requesting Certification of an Interlocutory Appeal. In his motion, Employee argued that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.[11]

Subsequently, on October 27, 2016, the AJ issued an order granting Employee's certification of the Interlocutory Appeal to the OEA Board.[12] On January 24, 2017, the Board issued an order granting Employee's Interlocutory Appeal. The Board determined that it would have been improper for the AJ to request additional briefs on DPM Chapter 24. It reasoned that Agency should not be allowed another opportunity to provide additional arguments through the submission of briefs. Accordingly, the Board granted the Interlocutory Appeal and remanded the matter to the AJ with instructions to determine whether the RIF resulting in Employee's termination was conducted in accordance with Chapter 24 of the DPM.[13]

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[9] *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R13, *Opinion and Order on Remand* (September 13, 2016).
[10] *Post-Status Conference Order* (October 20, 2016).
[11] *Motion Requesting Certification of an Interlocutory Appeal Regarding the Office's Plan to Accept Briefs or Any Further Argument on Remand and Motion to Stay the Proceedings During the Time the Interlocutory Appeal is Pending*, p. 2 (October 24, 2016).
[12] *Order Regarding Employee's Motion for an Interlocutory Appeal* (October 27, 2016).
[13] *Brendan Cassidy v. D.C. Public Schools*, OEA Matter No. 2401-0253-10R13R16, *Opinion and Order on Motion for Interlocutory Appeal*, p. 5-6 (January 24, 2017).

On March 10, 2017, Agency issued a Notice of Supplemental Authority. It argued that the D.C. Court of Appeals decision in *Vilean Stevens and Ike Profit v. District of Columbia Department of Health,* 150 A. 3d 307 (D.C. 2016), affirmed the decision of the OEA and the Superior Court, but the Court made several determinations that were directly counter to OEA's position on the application of the Abolishment Act.[14] Employee filed a Motion to Exclude on March 17, 2017. He, again, requested that Agency not be allowed an opportunity to provide additional arguments or authority.[15]

On May 25, 2017, the AJ issued his Second Initial Decision on Remand. The AJ held that he could not rely on the arguments presented in Agency's Notice of Supplemental Authority. He explained that doing so would run afoul with the clear instructions given by the OEA Board in its Opinion and Order on Motion for an Interlocutory Appeal. Without referencing any of the regulations outlined in DPM Chapter 24, the AJ determined that the RIF was properly conducted under the Abolishment Act; that Employee offered no proof that the competitive level and area in the instant matter were not properly constructed; that Employee was afforded one round of lateral competition; and that Agency provided Employee the required thirty-day notice. The AJ concluded that Employee's CLDF score was accurate and removal was appropriate because of his placement as the lowest ranked ET-15 English teacher at Agency. Accordingly, he upheld Agency's RIF action against Employee.[16]

On June 29, 2017, Employee filed a Petition for Review of the Second Initial Decision on Remand. He argues that the AJ's decision to dismiss his appeal was factually and legally

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[14] *District of Columbia Public Schools' Notice of Supplemental Authority* (March 10, 2017).
[15] *Employee's Motion to Exclude* (March 17, 2017).
[16] As it related specifically to the grievances filed, the AJ asserted that OEA no longer has jurisdiction over grievance appeals. He explained that Employee failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. In addition, he argued that Employee's numerous ancillary arguments were best characterized as grievances and are outside OEA's jurisdiction to adjudicate. *Second Initial Decision on Remand,* p. 2-6 (May 25, 2017).

incorrect. Employee states that he presented evidence to support a favorable ruling that Agency did not apply the regulations in Chapter 24 of the DPM. He explains that the AJ's decision failed to address or even acknowledge any aspect of DPM Chapter 24. Further, he argues that the decisions issued by the AJ were not based on substantial evidence and included an erroneous interpretation of statute and regulations. Employee contends that his due process rights were violated and that the AJ provided clear evidence of bias and a perceived lack of judicial integrity. Therefore, he requests that the OEA Board apply DPM Chapter 24 to the facts of his case and reverse the Second Initial Decision on Remand and the RIF action.[17]

Agency filed its response to Employee's petition on August 3, 2017. It submits that the AJ was correct in finding that it complied with Chapter 24. It is Agency's position that both Title 5, DCMR § 1503 and DPM Chapter 24 outline similar factors to be taken into account when providing one round of lateral competition. Further, Agency denies Employee's assertions that it failed to place him on a Priority Reemployment list. Agency, again, argues that the ruling in *Stevens v. District of Columbia Department of Health* overruled the OEA's decision that its RIFs were conducted pursuant to the Abolishment Act, instead of D.C. Official Code § 1-624.02.[18] Therefore, it requests that this Board uphold the AJ's ruling.[19]

The AJ provided a shockingly inadequate analysis of Chapter 24 in his Second Initial Decision on Remand. While it would be appropriate for this Board to remand the matter to the AJ to actually comply with its Opinion and Order on Remand, we will not. As requested by Employee, we will provide an analysis of DPM Chapter 24 based on the record before us. This

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[17] *Petition for Review of Second Initial Decision on Remand*, p. 3-8 (June 29, 2017).
[18] Agency asserts that Chapter 15 of the DCMR and not Chapter 24 of the DPM should govern Employee's RIF procedure because Chapter 24 applies only to RIFs carried out under the Abolishment Act. It states that under *Stevens*, the RIF should be governed by the general RIF statute, not the Abolishment Act. Based on *Stevens*, Agency argues that it was within its rights to conduct the 2009 RIF pursuant to the RIF statute and Title 5, Chapter 15 of the DCMR.
[19] *District of Columbia Public Schools' Response to Employee's Petition for Review* (August 3, 2017).

will be done primarily because this matter has been pending for far too long, and we do not wish to run the risk of the AJ wasting any additional time of the parties involved.

D.C. Official Code §1-624.08(f)(2) provides that "an employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied." Sections (d) and (e) offer the following:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to *Chapter 24 of the District of Columbia Personnel Manual*, which shall be limited to positions in the employee's competitive level (emphasis added).
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

Because the AJ determined that D.C. Official Code §1-624.08 governed this RIF action, we must rely on DPM Chapter 24 to determine if Agency provided one round of lateral competition and thirty days' notice.

DPM Chapter 24

The relevant provisions of DPM section 2406 provide the following:

> 2406.1 If a determination is made that a reduction in personnel is to be conducted pursuant to the provisions of §§ 2400 through 2431, the agency shall submit a request to the appropriate personnel authority to conduct a reduction in force.
>
> 2406.2 Upon approval of the request as provided in §§ 2406.1, the agency shall prepare the following:
>
> (a) An administrative order or equivalent identifying the competitive area, and the positions to be abolished, by position number, title, series, grade, and organizational location, and the reason therefore; and

(b) A D.C. Standard Form 52 (DC SF 52) for each position to be abolished, without indicating the name of the incumbent of the position.

2406.4 The approval by the appropriate personnel authority of the administrative order or amendment thereof shall constitute the authority for the agency to conduct a reduction in force.

Moreover, DPM Section 2408.1 provides that "the retention standing of each competing employee shall be determined on the basis of tenure of appointment, length of creditable service, veterans preference, residency preference, and relative work performance, and on the basis of other selection factors as provided in these regulations. Together, these factors shall determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released."

The record contains documents which provide that Chancellor Rhee was delegated authority to authorize the RIF. Through a letter to her deputy, Chancellor Rhee then authorized the Office of Human Resources to conduct the RIF. The document included the reason for the RIF; the RIF competitive areas; competitive levels, which were based on pay plans, pay grades, job titles, and subject taught; the competitive factors, which included the school needs, relevant performance, professional experience, District residency, Veteran's preference, and prior performance evaluations; and the timeline for the RIF notices.[20] Thus, Agency adhered to all of the terms provided for in DPM sections 2406.1, 2406.2(a), and 2406.4 of the regulation.

The Board was unable to locate a Standard Form 52 in the record, as required by DPM § 2406.2(b). However, we do not believe that Employee was prejudiced by this oversight because the information required in the Standard Form 52 is provided in the authorization notice and the database documents provided by Agency. The Standard Form 52 requests, *inter alia*, the type of personnel action taken, the position to be abolished, Veterans' Preference, pay series,

[20] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #1 (January 7, 2010).

employment type, the effective date, date of request, and grade and step. As provided above, the authorization notice from Chancellor Rhee established the reason for the RIF; competitive areas; competitive levels (pay plans, pay grades, job titles, and subject taught); competitive factors (school needs, relevant performance, professional experience, District residency, Veteran's preference, and prior performance evaluations); and the timeline for the RIF notices.[21] Additionally, the database document provided by Agency submitted the competitive area, position, pay plan, grade, full-time equivalent designation, name, employee number, position status (filled or vacant), competitive level, selection factors derived from employees' CLDF (including the school needs, their relevant contributions and performance, and professional experience), number of years employed by the District and federal government, Veterans' preference, residency preference, evaluation scores, total scores, and a field to indicate if they were separated from service due to the RIF.[22] Therefore, although not within a Standard Form 52, the information was evidenced in the record by Agency.

As for the retention register requirements, the database document included information beyond the requirements of DPM section 2408.1 regulation.[23] Although the database document does not provide a separate retention register, we determine that it is a *de minimus* error because the document is arranged by separate competitive levels so one can easily compare all employees within each competitive level. The database document indicates the action taken, but it does not provide the effective date of the action. The effective date of the RIF is, however, provided in

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[21] *Id.*
[22] *District of Columbia Public Schools' Brief,* Exhibit A (March 8, 2012).
[23] As previously provided, the document includes centralized data which included the competitive area, position, pay plan, grade, full-time equivalent designation, name, employee number, position status (filled or vacant), competitive level, selection factors derived from employees' CLDF (including the school needs, their relevant contributions and performance, and professional experience), number of years employed by the District and federal government, Veterans' preference, residency preference, evaluation scores, total scores, and a field to indicate if they were separated from service due to the RIF. *Id.*

Employee's notice.[24] Thus, Agency provided one round of lateral competition and did not impede Employee's due process rights.

Due Process with RIF actions

As it relates to due process in RIF actions, the D.C. Court of Appeals reasoned in *Grant v. District of Columbia*, 908 A.2d 1173, 1179 (D.C. 2006), and *Burton v. Office of Employee Appeals*, 30 A.3d 789, 798 (D.C. 2011) (citing *Leonard v. District of Columbia*, 794 A.2d 618, 624 (D.C. 2002), that in order to invoke due process protections, an employee must show that a protected liberty or property interest is implicated. However, the Court held in *Hoage v. Board of Trustees of University of District of Columbia*, 714 A.2d 776, 782 (D.C. 1998), that when the personnel action taken against an employee is a RIF, opposed to an adverse action for cause, "it is by no means obvious that a property interest in continued employment is even implicated . . . ." Furthermore, the *Hoage* Court reasoned that even if a property right is implicated by the RIF action, an employee is not denied due process if they are given notice and the opportunity to be heard.[25]

In the current matter, it is clear that Employee had an opportunity to be heard. Employee was able to present his arguments to OEA through his submission of documentary evidence. Additionally, he provided witness testimony, and he had the opportunity to cross examine Agency's witnesses at an evidentiary hearing. Thus, although Agency did not meet all of the specific requirements provided in DPM Chapter 24, as it relates to form 52 and the retention register, the RIF process was followed, and Agency did not violate Employee's due process rights. Employee was definitively provided an opportunity to be heard at OEA.

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[24] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010).
[25] *Also see Dupree v. District of Columbia Office of Employee Appeals*, 36 A.3d 826 (D.C. 2011) and *Laura Smart v. D.C. Child and Family Services*, OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014).

Notice

Moreover, it is undisputed that Employee received adequate notice of the RIF action. The notice requirements are outlined in DPM section 2422. The relevant sections provide the following:

> 2422.1 Each competing employee selected for release from his or her competitive level under this chapter shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release.
>
> 2422.3 A notice shall not be issued less than thirty (30) days before the effective date of the employee's release.
>
> 2422.5 An agency shall not retain an employee beyond the end of the notice period.
>
> 2422.6 The notice to the employee shall specify the effective date of the employee's release from his or her competitive level.
>
> 2422.8 A reduction-in-force action shall not be taken before the effective date of a notice.

The notice is dated October 2, 2009 and provided that "beginning immediately, [Employee] will be on paid administrative leave until November 2, 2009, the effective date of [his] separation." The notice explained that Employee may receive severance pay. It also stated that he may be eligible to retire in lieu of being separated. It provided Employee's appeal rights and that because he was separated as the result of a RIF, he would receive priority re-employment consideration.[26]

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[26] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010). As it relates to priority re-employment, the Superior Court for the District of Columbia held in *Webster v. District of Columbia Public Schools*, 2012 CA 006364 P(MPA), p. 8 (D.C. Super. Ct. December 9, 2013) that in accordance with D.C. Official Code § 1-624.08(h) and DPM section 2427.5, employees ". . . have a right to be added to the priority reemployment list . . . in light of the criteria under the procedures set forth in chapter 24 of the DCPM." *Petition for Appeal*, p. 7 (December 2, 2009). Employee's RIF notice provides the following:

> You may apply for any job vacancies at DCPS or within the District government that arise in the future. Employees separated pursuant to a reduction in force receive priority re-employment consideration, but are not guaranteed re-

Conclusion

Employee's RIF appeal has been thoroughly reviewed and analyzed at OEA. If, as Agency suggests, the general RIF statute should have been used, then the AJ provided substantial evidence in the first Initial Decision that the RIF action would be upheld under 5 DCMR § 1501. However, if the Abolishment Act was the correct statute in this matter, then Chapter 24 of the DPM is applicable. At the request of the Employee not to remand the matter to the AJ again, the Board provided a comprehensive analysis of Chapter 24 here. The RIF action is upheld under a review of either 5 DCMR § 1501 or DPM Chapter 24. Employee was provided with an opportunity to be heard. He received one round of lateral competition and adequate notice of the RIF. Therefore, we must deny Employee's Petition for Review of the Second Initial Decision on Remand.

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employment.

Thus, as Agency provided, it did comply with this statutory and regulatory requirements for the priority re-employment list, as was evidenced in Employee's RIF notice.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review of Second Initial Decision 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.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

BRENDAN J. CASSIDY, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS Respondent.	)	C.A. No. 2018 CA 002756 P(MPA) Honorable Elizabeth Wingo

AMENDED PETITION FOR REVIEW OF AGENCY DECISION

A. Notice

Notice is hereby given that Brendan J. Cassidy appeals to the Superior Court of the District of Columbia from the Opinion and Order on Second Remand the Board of the District of Columbia Office of Employee Appeals ("OEA") issued on the 2nd day of March, 2018. A copy of that Opinion and Order on Second Remand was attached to the original petition and is also attached here.

In its Opinion and Order the OEA Board denied Mr. Cassidy's Petition for Review of Second Initial Decision on Remand and upheld the termination of Mr. Cassidy, an English teacher, in a reduction-in-force ("RIF") the District of Columbia Public Schools ("DCPS") conducted on October 2, 2009.

Statement of Proceedings and Decision

The OEA Board issued its Opinion and Order on Second Remand on March 2, 2018. Mr. Cassidy had presented three claims before the OEA.

Briefly, the **first claim** was that when DCPS conducted the October 2009 RIF, it did not provide the petitioner with one round of lateral competition, an essential element

of the RIF, in accordance with all applicable laws and regulations. Essential to the one round of lateral competition was the use of a Competitive Level Documentation Form ("CLDF"), which is akin to a scorecard. Once the principal decided to cut an English teacher position, the principal was to complete a CLDF for each English teacher, and the lowest scoring English teacher would be terminated in the RIF. Given the documentary evidence and undisputed facts Mr. Cassidy presented that were clearly applicable to several objective factors in DCPS's directions regarding how the CLDF was to be scored, the scores of zero (0) and ten exclusively negative statements in the comments section of the CLDF clearly show that the CLDF was used punitively.

Employee argued the CLDF is evidence of prejudice and abuse of discretion and evidence petitioner was not provided one round of lateral competition in accordance with all applicable laws and regulations.

In both the Initial Decision on Remand (p. 29) and Second Initial Decision on Remand (p. 6), the AJ found Employee "properly received one round of lateral competition," and the CLDF was supported by substantial evidence. In the OEA Board's Opinion and Order on Remand, it found the AJ "offered a detailed and thorough analysis of the CLDF" (p. 3) and "a compelling analysis" (p. 5). The Board's Opinion and Order on Second Remand does not include any further discussion of the CLDF, stating simply, "Employee's RIF appeal has been thoroughly reviewed and analyzed at OEA" (p. 11).

Petitioner argued before the AJ and OEA Board and argues here that the CLDF was not supported by substantial evidence, and essential elements of it were *directly contradicted* by documentary evidence in the record. The decisions of the Administrative

Judge ("AJ") and the Opinion and Order of the OEA Board show that neither the AJ nor the OEA Board considered material facts and issues that were plainly before them.

Very briefly, the **second claim** was the principal used the RIF as a pretext to terminate the petitioner. There had been an enrollment drop of approximately one hundred (100) students at McKinley over the course the summer before the October 2nd RIF. This meant there were 100 fewer students than had been planned at the end of the previous school year. This had a significant impact on the ratio of students-to-*English teachers*, and ordinarily it would have led the administration to cut one English teacher from the staff that fall in what DCPS called the "equalization process."

However, because another English teacher had left the school during the summer, there was a *vacant*, unfilled English teacher position that could have been cut in either the "equalization process" or the RIF.

If that *vacant* position had been cut, the students-to-English teachers ratio would have been what it was the year before, in school year 2008-09, and what it was again after the October 2009 RIF, in school year 2009-10. If that *vacant* position had been cut, *no English teacher would have been terminated in the RIF*. Instead of cutting that *vacant* position, the principal filled it by hiring a new, clearly *surplus* English teacher on August 24th, ***just 18 days*** – *less than 3 weeks* – before the RIF was authorized on September 10th and less than 6 weeks before the RIF was actually conducted.

That unnecessary August 24th hiring of a clearly *surplus* English teacher is evidence the principal used the RIF as a pretext to terminate the petitioner. The timing of the hiring and the scores of zero (0) show the principal knew when he hired the new English teacher that he intended to use it as an opportunity to terminate Petitioner.

In the AJ's Initial Decision on Remand (p. 29), the AJ found "Employee's pretext argument is baseless." In the AJ's Second Initial Decision on Remand, the AJ did not specifically address this element of Employee's case but stated, "Employee has failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented" (p. 5). In the OEA Board's Opinion and Order on Remand, it found the AJ "offered a detailed and thorough analysis of the ... pretext arguments raised by Employee" (p. 3). The Board's Opinion and Order on Second Remand does not include any mention of Petitioner's pretext claim.

Mr. Cassidy's claim was supported by what was clearly the preponderance of evidence, and the conclusions in the AJ's decisions and OEA Board's Opinion and Orders regarding the Petitioner's pretext claim are not supported by substantial evidence.

Please note the evidence supporting each of these first two claims reinforces the two claims.

The **third claim** was based on the Administrative Judge's consistently finding that the statute that governed the RIF was the Abolishment Act, not the statute DCPS identified and applied when it conducted the RIF. The Administrative Judge consistently went on to include a quotation from the Abolishment Act that *explicitly states* the regulations applicable to conducting one round of lateral competition were those in Chapter 24 of the District Personnel Manual ("DPM"). These regulations and the regulations DCPS actually applied in conducting the RIF differ greatly. DPM Chapter 24 does not include any reference to CLDF's, and the most influential factor in ranking employees in one round of lateral competition is *years of service*.

Very briefly, Petitioner presented a second issue connected to this third claim regarding DPM Chapter 24. The issue was that provisions in DPM Chapter 24 clearly state employees terminated in a RIF are to be placed on a Priority Reemployment List and included in a Displaced Employees Program and provided reemployment, ***not simply*** priority "consideration" for reemployment.

Despite the AJ's finding the Abolishment Act governed the RIF and including a quotation from the statute that *explicitly* points to DPM Chapter 24, the AJ *never applied those regulations* in his (a) Initial Decision, (b) Initial Decision on Remand, or (c) Second Initial Decision on Remand. He never did so even though this issue was plainly before him in Mr. Cassidy's written closing arguments and the OEA Board directed him to do so in its Opinion and Order on Petition for Review on Remand and its Opinion and Order on Motion for Interlocutory Appeal. Mr. Cassidy's case was prejudiced and harmed by it.

The OEA Board's March 2, 2018, Opinion and Order on Second Remand includes the statement, "The AJ provided a shockingly inadequate analysis of Chapter 24 in his Second Initial Decision on Remand" (p. 5). However, the Board's own analysis of Chapter 24 clearly overlooks or misapprehends or misinterprets the process for conducting one round of lateral competition described in those regulations.

The OEA Board's own analysis of Chapter 24 also clearly misapprehends or misinterprets the provisions regarding the Priority Reemployment List and Displaced Employees Program. The Board equates the mere reference to priority "consideration" for reemployment in Petitioner's notice of termination, noting Employee was "not guaranteed re-employment" (p. 10-11), with the provisions in DPM Chapter 24 regarding

the Priority Reemployment List and Displaced Employees Program, which ultimately provide reemployment, ***not simply*** priority "consideration" for reemployment.

In addition to presenting the three claims discussed in the preceding pages, Mr. Cassidy argued before the OEA Board and argues here that the AJ's choosing not to address his third claim and choosing not to apply DPM Chapter 24 when it was plainly before him in Mr. Cassidy's closing argument, and the AJ's doing so again even after the OEA Board directed him to do so, is obvious evidence of bias. Petitioner is concerned about the integrity of the process at the OEA. Petitioner argued before the OEA Board and argues here that it would not be reasonable, or consistent with justice and fairness, to assume the AJ's handling of the other two claims was free of this bias. It would be reasonable to assume it was affected by this bias.

By not addressing this issue, the AJ in effect put Mr. Cassidy's case on hold for what the AJ certainly knew or should have known would be a period of *well over one year*. The AJ did that knowing the impact that a delay like that can have on the likelihood a plaintiff will withdraw from a case, simply because an individual's life circumstances require it. The AJ also knew that putting the case on hold for over a year would subject it to the possibility that new case law might come into effect that might change the outcome of the case. Additionally, the AJ did so during a period in which the OEA's General Counsel was engaged as the respondent in a case that was before the Superior Court of the District of Columbia and later the District of Columbia Court of Appeals that the OEA Board ultimately found undermined Petitioner's third claim, *Vilean Stevens and Ike Prophet v. District of Columbia Department of Health*, 150 A.3d 307 (D.C. 2016) (Opinion and Order on Second Remand, p. 4-5).

Petitioner respectfully requests that the Court please consider whether the AJ's handling of the present matter casts doubt on the integrity of the process at the OEA, or presents any issue of judicial integrity. If the Court were to find that the decision in *Vilean Stevens* undermined his third claim, Petitioner argues his right to equal protection and right to due process were compromised.

Petitioner submits that there are three bases for his appeal.

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

II. The findings of the presiding official are not based on substantial evidence.

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

Nature of Relief Requested

Petitioner respectfully requests that the Court reverse the OEA Board's Opinion and Order on Second Remand and order the Petitioner be reinstated to his former position and provided all back pay and benefits that would have accrued since his termination.

B. Address of Respondent Agency or Official:

Lasheka Brown Bassey, Esq.
General Counsel
Government of the District of Columbia
Office of Employee Appeals
955 L'Enfant Plaza
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Washington, D.C. 20024

C. Names and Addresses of all other parties to the agency proceeding:

For Petitioner:

Brendan J. Cassidy
4613 Calvert Rd., Rd. #6
College Park, MD 20740

For District of Columbia Public Schools:

Carl L. Turpin, Esq.
Assistant Attorney General
District of Columbia Public Schools
1200 First St., N.E.
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Washington, D.C. 20002

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

For Petitioner:

Brendan J. Cassidy
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For Respondent:

Lasheka Brown Bassey, Esq.
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For District of Columbia Public Schools
(potential intervenor):

Carl L. Turpin, Esq.
Assistant Attorney General
District of Columbia Public Schools
1200 First St., N.E.
10th Floor
Washington, D.C. 20002

E. A copy of the agency opinion and order is attached.

Brendan Cassidy

Printed Name of Petitioner (*pro se*)

Brendan Cassidy

Signature of Petitioner (*pro se*)

Brendan Cassidy (*pro se*)
4613 Calvert Rd., #6
College Park, MD 20740
(301) 779-8584

Certificate of Service

I certify that on May 14, 2018, I sent a true and accurate copy of this document, Employee's Amended Petition for Review of Agency Decision, via USPS Certified Mail to each of the following:

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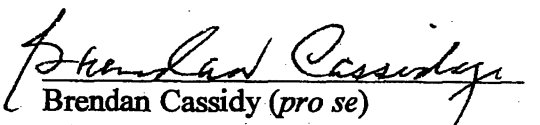

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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDAN CASSIDY,	)	
Employee	)	OEA Matter No. 2401-0253-10R13R16
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON SECOND REMAND

This matter has been previously before the Office of Employee Appeals' ("OEA") Board. By way of background, Brendan Cassidy ("Employee") worked as an English teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

The Administrative Judge ("AJ") issued his Initial Decision on April 10, 2012.[2] In its July 2013 Opinion and Order, the OEA Board found that the AJ failed to consider all material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ

[1] *Petition for Appeal*, p. 6 (December 2, 2009).
[2] The AJ ruled that Agency's action was proper and consistent with processing RIFs. Moreover, he held that Employee was provided with the requisite thirty-day notice for a RIF action. Accordingly, he upheld the RIF against Employee. *Initial Decision* (April 10, 2012).

to consider Employee's arguments.[3]

On remand, the parties engaged in an extensive discovery process and an evidentiary hearing was held by the AJ. Of importance to note, was Employee's assertion that Agency failed to use D.C. Official Code § 1-624.08 and District Personnel Manual ("DPM") Chapter 24 when conducting the RIF action against him.[4] The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08, instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. However, the AJ improperly relied on Title 5, DCMR § 1503.2 *et al.* and 1503.1 when analyzing Employee's one round of lateral competition.[5]

Employee filed a Petition for Review on Remand on July 2, 2015. He contended that the AJ's decision failed to consider that Agency did not properly administer the RIF because of its use of Title 5, DCMR § 1503.2 *et al.*, instead of DPM Chapter 24.[6] On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provided that if DPM Chapter 24 should have been considered, it still complied with those requirements.[7] Accordingly, Agency requested that the OEA Board uphold the AJ's Initial Decision on Remand.[8]

On September 13, 2016, the OEA Board held that in accordance with *Webster Rogers, Jr.*

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[3] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13, p. 4-5, *Opinion and Order on Petition for Review* (July 31, 2013).
[4] *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law,* p. 40 and 62-70 (May 5, 2015).
[5] *Initial Decision on Remand* (May 28, 2015).
[6] *Petition for Review of Initial Decision on Remand* (July 2, 2015).
[7] Agency explained that the relevant section of DPM Chapter 24 requires that tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance be considered to determine if an employee is retained or released. It asserted that it considered all of these factors together. Therefore, its decision to RIF Employee was proper.
[8] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 5-11 (August 5, 2015). Employee filed a reply to Agency's Response to Petition for Review and made many of the same arguments presented in his Closing Brief and Petition for Review on Remand. *Employee's Reply to Agency's Response to Employee's Petition for Review of Initial Decision on Remand* (August 18, 2015).

v. D.C. Public Schools, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Accordingly, the matter was remanded to the AJ a second time, for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as required in D.C. Official Code § 1-624.08.[9]

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on whether Agency complied with DPM Chapter 24.[10] On October 24, 2016, Employee filed a Motion Requesting Certification of an Interlocutory Appeal. In his motion, Employee argued that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.[11]

Subsequently, on October 27, 2016, the AJ issued an order granting Employee's certification of the Interlocutory Appeal to the OEA Board.[12] On January 24, 2017, the Board issued an order granting Employee's Interlocutory Appeal. The Board determined that it would have been improper for the AJ to request additional briefs on DPM Chapter 24. It reasoned that Agency should not be allowed another opportunity to provide additional arguments through the submission of briefs. Accordingly, the Board granted the Interlocutory Appeal and remanded the matter to the AJ with instructions to determine whether the RIF resulting in Employee's termination was conducted in accordance with Chapter 24 of the DPM.[13]

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[9] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13, *Opinion and Order on Remand* (September 13, 2016).
[10] *Post-Status Conference Order* (October 20, 2016).
[11] *Motion Requesting Certification of an Interlocutory Appeal Regarding the Office's Plan to Accept Briefs or Any Further Argument on Remand and Motion to Stay the Proceedings During the Time the Interlocutory Appeal is Pending,* p. 2 (October 24, 2016).
[12] *Order Regarding Employee's Motion for an Interlocutory Appeal* (October 27, 2016).
[13] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13R16, *Opinion and Order on Motion for Interlocutory Appeal,* p. 5-6 (January 24, 2017).

On March 10, 2017, Agency issued a Notice of Supplemental Authority. It argued that the D.C. Court of Appeals decision in *Vilean Stevens and Ike Profit v. District of Columbia Department of Health,* 150 A. 3d 307 (D.C. 2016), affirmed the decision of the OEA and the Superior Court, but the Court made several determinations that were directly counter to OEA's position on the application of the Abolishment Act.[14] Employee filed a Motion to Exclude on March 17, 2017. He, again, requested that Agency not be allowed an opportunity to provide additional arguments or authority.[15]

On May 25, 2017, the AJ issued his Second Initial Decision on Remand. The AJ held that he could not rely on the arguments presented in Agency's Notice of Supplemental Authority. He explained that doing so would run afoul with the clear instructions given by the OEA Board in its Opinion and Order on Motion for an Interlocutory Appeal. Without referencing any of the regulations outlined in DPM Chapter 24, the AJ determined that the RIF was properly conducted under the Abolishment Act; that Employee offered no proof that the competitive level and area in the instant matter were not properly constructed; that Employee was afforded one round of lateral competition; and that Agency provided Employee the required thirty-day notice. The AJ concluded that Employee's CLDF score was accurate and removal was appropriate because of his placement as the lowest ranked ET-15 English teacher at Agency. Accordingly, he upheld Agency's RIF action against Employee.[16]

On June 29, 2017, Employee filed a Petition for Review of the Second Initial Decision on Remand. He argues that the AJ's decision to dismiss his appeal was factually and legally

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[14] *District of Columbia Public Schools' Notice of Supplemental Authority* (March 10, 2017).
[15] *Employee's Motion to Exclude* (March 17, 2017).
[16] As it related specifically to the grievances filed, the AJ asserted that OEA no longer has jurisdiction over grievance appeals. He explained that Employee failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. In addition, he argued that Employee's numerous ancillary arguments were best characterized as grievances and are outside OEA's jurisdiction to adjudicate. *Second Initial Decision on Remand,* p. 2-6 (May 25, 2017).

incorrect. Employee states that he presented evidence to support a favorable ruling that Agency did not apply the regulations in Chapter 24 of the DPM. He explains that the AJ's decision failed to address or even acknowledge any aspect of DPM Chapter 24. Further, he argues that the decisions issued by the AJ were not based on substantial evidence and included an erroneous interpretation of statute and regulations. Employee contends that his due process rights were violated and that the AJ provided clear evidence of bias and a perceived lack of judicial integrity. Therefore, he requests that the OEA Board apply DPM Chapter 24 to the facts of his case and reverse the Second Initial Decision on Remand and the RIF action.[17]

Agency filed its response to Employee's petition on August 3, 2017. It submits that the AJ was correct in finding that it complied with Chapter 24. It is Agency's position that both Title 5, DCMR § 1503 and DPM Chapter 24 outline similar factors to be taken into account when providing one round of lateral competition. Further, Agency denies Employee's assertions that it failed to place him on a Priority Reemployment list. Agency, again, argues that the ruling in *Stevens v. District of Columbia Department of Health* overruled the OEA's decision that its RIFs were conducted pursuant to the Abolishment Act, instead of D.C. Official Code § 1-624.02.[18] Therefore, it requests that this Board uphold the AJ's ruling.[19]

The AJ provided a shockingly inadequate analysis of Chapter 24 in his Second Initial Decision on Remand. While it would be appropriate for this Board to remand the matter to the AJ to actually comply with its Opinion and Order on Remand, we will not. As requested by Employee, we will provide an analysis of DPM Chapter 24 based on the record before us. This

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[17] *Petition for Review of Second Initial Decision on Remand*, p. 3-8 (June 29, 2017).
[18] Agency asserts that Chapter 15 of the DCMR and not Chapter 24 of the DPM should govern Employee's RIF procedure because Chapter 24 applies only to RIFs carried out under the Abolishment Act. It states that under *Stevens*, the RIF should be governed by the general RIF statute, not the Abolishment Act. Based on *Stevens*, Agency argues that it was within its rights to conduct the 2009 RIF pursuant to the RIF statute and Title 5, Chapter 15 of the DCMR.
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D.C. Official Code §1-624.08(f)(2) provides that "an employee may file with the Office of Employee Appeals an appeal contesting that the separation procedures of subsections (d) and (e) were not properly applied." Sections (d) and (e) offer the following:

> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to *Chapter 24 of the District of Columbia Personnel Manual*, which shall be limited to positions in the employee's competitive level (emphasis added).
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

Because the AJ determined that D.C. Official Code §1-624.08 governed this RIF action, we must rely on DPM Chapter 24 to determine if Agency provided one round of lateral competition and thirty days' notice.

DPM Chapter 24

The relevant provisions of DPM section 2406 provide the following:

> 2406.1 If a determination is made that a reduction in personnel is to be conducted pursuant to the provisions of §§ 2400 through 2431, the agency shall submit a request to the appropriate personnel authority to conduct a reduction in force.
>
> 2406.2 Upon approval of the request as provided in §§ 2406.1, the agency shall prepare the following:
>
> (a) An administrative order or equivalent identifying the competitive area, and the positions to be abolished, by position number, title, series, grade, and organizational location, and the reason therefore; and

(b) A D.C. Standard Form 52 (DC SF 52) for each position to be abolished, without indicating the name of the incumbent of the position.

2406.4 The approval by the appropriate personnel authority of the administrative order or amendment thereof shall constitute the authority for the agency to conduct a reduction in force.

Moreover, DPM Section 2408.1 provides that "the retention standing of each competing employee shall be determined on the basis of tenure of appointment, length of creditable service, veterans preference, residency preference, and relative work performance, and on the basis of other selection factors as provided in these regulations. Together, these factors shall determine whether an employee is entitled to compete with other employees for employment retention and, if so, with whom, and whether the employee is retained or released."

The record contains documents which provide that Chancellor Rhee was delegated authority to authorize the RIF. Through a letter to her deputy, Chancellor Rhee then authorized the Office of Human Resources to conduct the RIF. The document included the reason for the RIF; the RIF competitive areas; competitive levels, which were based on pay plans, pay grades, job titles, and subject taught; the competitive factors, which included the school needs, relevant performance, professional experience, District residency, Veteran's preference, and prior performance evaluations; and the timeline for the RIF notices.[20] Thus, Agency adhered to all of the terms provided for in DPM sections 2406.1, 2406.2(a), and 2406.4 of the regulation.

The Board was unable to locate a Standard Form 52 in the record, as required by DPM § 2406.2(b). However, we do not believe that Employee was prejudiced by this oversight because the information required in the Standard Form 52 is provided in the authorization notice and the database documents provided by Agency. The Standard Form 52 requests, *inter alia*, the type of personnel action taken, the position to be abolished, Veterans' Preference, pay series,

[20] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #1 (January 7, 2010).

employment type, the effective date, date of request, and grade and step. As provided above, the authorization notice from Chancellor Rhee established the reason for the RIF; competitive areas; competitive levels (pay plans, pay grades, job titles, and subject taught); competitive factors (school needs, relevant performance, professional experience, District residency, Veteran's preference, and prior performance evaluations); and the timeline for the RIF notices.[21] Additionally, the database document provided by Agency submitted the competitive area, position, pay plan, grade, full-time equivalent designation, name, employee number, position status (filled or vacant), competitive level, selection factors derived from employees' CLDF (including the school needs, their relevant contributions and performance, and professional experience), number of years employed by the District and federal government, Veterans' preference, residency preference, evaluation scores, total scores, and a field to indicate if they were separated from service due to the RIF.[22] Therefore, although not within a Standard Form 52, the information was evidenced in the record by Agency.

As for the retention register requirements, the database document included information beyond the requirements of DPM section 2408.1 regulation.[23] Although the database document does not provide a separate retention register, we determine that it is a *de minimus* error because the document is arranged by separate competitive levels so one can easily compare all employees within each competitive level. The database document indicates the action taken, but it does not provide the effective date of the action. The effective date of the RIF is, however, provided in

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[21] *Id.*
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Employee's notice.[24] Thus, Agency provided one round of lateral competition and did not impede Employee's due process rights.

Due Process with RIF actions

As it relates to due process in RIF actions, the D.C. Court of Appeals reasoned in *Grant v. District of Columbia*, 908 A.2d 1173, 1179 (D.C. 2006), and *Burton v. Office of Employee Appeals*, 30 A.3d 789, 798 (D.C. 2011) (citing *Leonard v. District of Columbia*, 794 A.2d 618, 624 (D.C. 2002), that in order to invoke due process protections, an employee must show that a protected liberty or property interest is implicated. However, the Court held in *Hoage v. Board of Trustees of University of District of Columbia*, 714 A.2d 776, 782 (D.C. 1998), that when the personnel action taken against an employee is a RIF, opposed to an adverse action for cause, "it is by no means obvious that a property interest in continued employment is even implicated . . . ." Furthermore, the *Hoage* Court reasoned that even if a property right is implicated by the RIF action, an employee is not denied due process if they are given notice and the opportunity to be heard.[25]

In the current matter, it is clear that Employee had an opportunity to be heard. Employee was able to present his arguments to OEA through his submission of documentary evidence. Additionally, he provided witness testimony, and he had the opportunity to cross examine Agency's witnesses at an evidentiary hearing. Thus, although Agency did not meet all of the specific requirements provided in DPM Chapter 24, as it relates to form 52 and the retention register, the RIF process was followed, and Agency did not violate Employee's due process rights. Employee was definitively provided an opportunity to be heard at OEA.

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[24] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010).
[25] *Also see Dupree v. District of Columbia Office of Employee Appeals*, 36 A.3d 826 (D.C. 2011) and *Laura Smart v. D.C. Child and Family Services*, OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014).

Notice

Moreover, it is undisputed that Employee received adequate notice of the RIF action. The notice requirements are outlined in DPM section 2422. The relevant sections provide the following:

> 2422.1 Each competing employee selected for release from his or her competitive level under this chapter shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release.
>
> 2422.3 A notice shall not be issued less than thirty (30) days before the effective date of the employee's release.
>
> 2422.5 An agency shall not retain an employee beyond the end of the notice period.
>
> 2422.6 The notice to the employee shall specify the effective date of the employee's release from his or her competitive level.
>
> 2422.8 A reduction-in-force action shall not be taken before the effective date of a notice.

The notice is dated October 2, 2009 and provided that "beginning immediately, [Employee] will be on paid administrative leave until November 2, 2009, the effective date of [his] separation." The notice explained that Employee may receive severance pay. It also stated that he may be eligible to retire in lieu of being separated. It provided Employee's appeal rights and that because he was separated as the result of a RIF, he would receive priority re-employment consideration.[26]

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[26] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010). As it relates to priority re-employment, the Superior Court for the District of Columbia held in *Webster v. District of Columbia Public Schools*, 2012 CA 006364 P(MPA), p. 8 (D.C. Super. Ct. December 9, 2013) that in accordance with D.C. Official Code § 1-624.08(h) and DPM section 2427.5, employees ". . . have a right to be added to the priority reemployment list . . . in light of the criteria under the procedures set forth in chapter 24 of the DCPM." *Petition for Appeal*, p. 7 (December 2, 2009). Employee's RIF notice provides the following:

> You may apply for any job vacancies at DCPS or within the District government that arise in the future. Employees separated pursuant to a reduction in force receive priority re-employment consideration, but are not guaranteed re-

Conclusion

Employee's RIF appeal has been thoroughly reviewed and analyzed at OEA. If, as Agency suggests, the general RIF statute should have been used, then the AJ provided substantial evidence in the first Initial Decision that the RIF action would be upheld under 5 DCMR § 1501. However, if the Abolishment Act was the correct statute in this matter, then Chapter 24 of the DPM is applicable. At the request of the Employee not to remand the matter to the AJ again, the Board provided a comprehensive analysis of Chapter 24 here. The RIF action is upheld under a review of either 5 DCMR § 1501 or DPM Chapter 24. Employee was provided with an opportunity to be heard. He received one round of lateral competition and adequate notice of the RIF. Therefore, we must deny Employee's Petition for Review of the Second Initial Decision on Remand.

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employment.

Thus, as Agency provided, it did comply with this statutory and regulatory requirements for the priority re-employment list, as was evidenced in Employee's RIF notice.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review of Second Initial Decision 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.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRENDAN J. CASSIDY, Petitioner v. DISTRICT OF COLUBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 002756 P(MPA) Judge Jose M. Lopez **Next Event: Status Hearing** **Friday, May 17, 2019 at 9:30 a.m.**

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

Pursuant to the Order that was entered on November 5, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Brendan Cassidy v. D.C. Public Schools* OEA Matter Number 2401-0253-10R13R16 (March 22, 2018), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2019, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Nada Paisant
Counsel for Respondent

Brendan J. Cassidy
Petitioner

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRENDAN CASSIDY,	)	
Employee	)	OEA Matter No. 2401-0253-10R13R16
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON SECOND REMAND

This matter has been previously before the Office of Employee Appeals' ("OEA") Board. By way of background, Brendan Cassidy ("Employee") worked as an English teacher with the D.C. Public Schools ("Agency"). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009.[1]

The Administrative Judge ("AJ") issued his Initial Decision on April 10, 2012.[2] In its July 2013 Opinion and Order, the OEA Board found that the AJ failed to consider all material issues of law or fact raised by Employee on appeal. Therefore, it remanded the matter to the AJ

[1] *Petition for Appeal*, p. 6 (December 2, 2009).
[2] The AJ ruled that Agency's action was proper and consistent with processing RIFs. Moreover, he held that Employee was provided with the requisite thirty-day notice for a RIF action. Accordingly, he upheld the RIF against Employee. *Initial Decision* (April 10, 2012).

v. D.C. Public Schools, 2012 CA 006364 P(MPA)(D.C. Super. Ct. December 9, 2013), Chapter 24 of the DPM should be used when determining if the RIF actions conducted under D.C. Official Code § 1-624.08 were proper. Accordingly, the matter was remanded to the AJ a second time, for the limited purpose of determining if Agency complied with DPM Chapter 24 when conducting the RIF action, as required in D.C. Official Code § 1-624.08.[9]

The AJ held a Status Conference on October 17, 2016. Subsequently, he issued a Post-Status Conference Order requesting that both parties submit briefs on whether Agency complied with DPM Chapter 24.[10] On October 24, 2016, Employee filed a Motion Requesting Certification of an Interlocutory Appeal. In his motion, Employee argued that his case would be unfairly prejudiced if Agency was allowed to submit briefs on DPM Chapter 24, when it had ample opportunity to provide this information before the record was closed.[11]

Subsequently, on October 27, 2016, the AJ issued an order granting Employee's certification of the Interlocutory Appeal to the OEA Board.[12] On January 24, 2017, the Board issued an order granting Employee's Interlocutory Appeal. The Board determined that it would have been improper for the AJ to request additional briefs on DPM Chapter 24. It reasoned that Agency should not be allowed another opportunity to provide additional arguments through the submission of briefs. Accordingly, the Board granted the Interlocutory Appeal and remanded the matter to the AJ with instructions to determine whether the RIF resulting in Employee's termination was conducted in accordance with Chapter 24 of the DPM.[13]

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[9] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13, *Opinion and Order on Remand* (September 13, 2016).
[10] *Post-Status Conference Order* (October 20, 2016).
[11] *Motion Requesting Certification of an Interlocutory Appeal Regarding the Office's Plan to Accept Briefs or Any Further Argument on Remand and Motion to Stay the Proceedings During the Time the Interlocutory Appeal is Pending,* p. 2 (October 24, 2016).
[12] *Order Regarding Employee's Motion for an Interlocutory Appeal* (October 27, 2016).
[13] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13R16, *Opinion and Order on Motion for Interlocutory Appeal,* p. 5-6 (January 24, 2017).

to consider Employee's arguments.[3]

On remand, the parties engaged in an extensive discovery process and an evidentiary hearing was held by the AJ. Of importance to note, was Employee's assertion that Agency failed to use D.C. Official Code § 1-624.08 and District Personnel Manual ("DPM") Chapter 24 when conducting the RIF action against him.[4] The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08, instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. However, the AJ improperly relied on Title 5, DCMR § 1503.2 *et al.* and 1503.1 when analyzing Employee's one round of lateral competition.[5]

Employee filed a Petition for Review on Remand on July 2, 2015. He contended that the AJ's decision failed to consider that Agency did not properly administer the RIF because of its use of Title 5, DCMR § 1503.2 *et al.*, instead of DPM Chapter 24.[6] On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provided that if DPM Chapter 24 should have been considered, it still complied with those requirements.[7] Accordingly, Agency requested that the OEA Board uphold the AJ's Initial Decision on Remand.[8]

On September 13, 2016, the OEA Board held that in accordance with *Webster Rogers, Jr.*

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[3] *Brendan Cassidy v. D.C. Public Schools,* OEA Matter No. 2401-0253-10R13, p. 4-5, *Opinion and Order on Petition for Review* (July 31, 2013).
[4] *Employee's Closing Argument, Proposed Findings of Fact, and Proposed Conclusions of Law,* p. 40 and 62-70 (May 5, 2015).
[5] *Initial Decision on Remand* (May 28, 2015).
[6] *Petition for Review of Initial Decision on Remand* (July 2, 2015).
[7] Agency explained that the relevant section of DPM Chapter 24 requires that tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance be considered to determine if an employee is retained or released. It asserted that it considered all of these factors together. Therefore, its decision to RIF Employee was proper.
[8] *District of Columbia Public Schools' Response to Employee's Petition for Review,* p. 5-11 (August 5, 2015). Employee filed a reply to Agency's Response to Petition for Review and made many of the same arguments presented in his Closing Brief and Petition for Review on Remand. *Employee's Reply to Agency's Response to Employee's Petition for Review of Initial Decision on Remand* (August 18, 2015).

On March 10, 2017, Agency issued a Notice of Supplemental Authority. It argued that the D.C. Court of Appeals decision in *Vilean Stevens and Ike Profit v. District of Columbia Department of Health,* 150 A. 3d 307 (D.C. 2016), affirmed the decision of the OEA and the Superior Court, but the Court made several determinations that were directly counter to OEA's position on the application of the Abolishment Act.[14] Employee filed a Motion to Exclude on March 17, 2017. He, again, requested that Agency not be allowed an opportunity to provide additional arguments or authority.[15]

On May 25, 2017, the AJ issued his Second Initial Decision on Remand. The AJ held that he could not rely on the arguments presented in Agency's Notice of Supplemental Authority. He explained that doing so would run afoul with the clear instructions given by the OEA Board in its Opinion and Order on Motion for an Interlocutory Appeal. Without referencing any of the regulations outlined in DPM Chapter 24, the AJ determined that the RIF was properly conducted under the Abolishment Act; that Employee offered no proof that the competitive level and area in the instant matter were not properly constructed; that Employee was afforded one round of lateral competition; and that Agency provided Employee the required thirty-day notice. The AJ concluded that Employee's CLDF score was accurate and removal was appropriate because of his placement as the lowest ranked ET-15 English teacher at Agency. Accordingly, he upheld Agency's RIF action against Employee.[16]

On June 29, 2017, Employee filed a Petition for Review of the Second Initial Decision on Remand. He argues that the AJ's decision to dismiss his appeal was factually and legally

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[14] *District of Columbia Public Schools' Notice of Supplemental Authority* (March 10, 2017).
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[16] As it related specifically to the grievances filed, the AJ asserted that OEA no longer has jurisdiction over grievance appeals. He explained that Employee failed to proffer any credible evidence that would indicate that the RIF was improperly conducted and implemented. In addition, he argued that Employee's numerous ancillary arguments were best characterized as grievances and are outside OEA's jurisdiction to adjudicate. *Second Initial Decision on Remand,* p. 2-6 (May 25, 2017).

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The AJ provided a shockingly inadequate analysis of Chapter 24 in his Second Initial Decision on Remand. While it would be appropriate for this Board to remand the matter to the AJ to actually comply with its Opinion and Order on Remand, we will not. As requested by Employee, we will provide an analysis of DPM Chapter 24 based on the record before us. This

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Due Process with RIF actions

As it relates to due process in RIF actions, the D.C. Court of Appeals reasoned in *Grant v. District of Columbia*, 908 A.2d 1173, 1179 (D.C. 2006), and *Burton v. Office of Employee Appeals*, 30 A.3d 789, 798 (D.C. 2011) (citing *Leonard v. District of Columbia*, 794 A.2d 618, 624 (D.C. 2002), that in order to invoke due process protections, an employee must show that a protected liberty or property interest is implicated. However, the Court held in *Hoage v. Board of Trustees of University of District of Columbia*, 714 A.2d 776, 782 (D.C. 1998), that when the personnel action taken against an employee is a RIF, opposed to an adverse action for cause, "it is by no means obvious that a property interest in continued employment is even implicated . . . ." Furthermore, the *Hoage* Court reasoned that even if a property right is implicated by the RIF action, an employee is not denied due process if they are given notice and the opportunity to be heard.[25]

In the current matter, it is clear that Employee had an opportunity to be heard. Employee was able to present his arguments to OEA through his submission of documentary evidence. Additionally, he provided witness testimony, and he had the opportunity to cross examine Agency's witnesses at an evidentiary hearing. Thus, although Agency did not meet all of the specific requirements provided in DPM Chapter 24, as it relates to form 52 and the retention register, the RIF process was followed, and Agency did not violate Employee's due process rights. Employee was definitively provided an opportunity to be heard at OEA.

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[24] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010).
[25] *Also see Dupree v. District of Columbia Office of Employee Appeals*, 36 A.3d 826 (D.C. 2011) and *Laura Smart v. D.C. Child and Family Services*, OEA Matter No. 2401-0328-10, *Opinion and Order on Petition for Review* (March 4, 2014).

Notice

Moreover, it is undisputed that Employee received adequate notice of the RIF action. The notice requirements are outlined in DPM section 2422. The relevant sections provide the following:

> 2422.1 Each competing employee selected for release from his or her competitive level under this chapter shall be entitled to written notice at least thirty (30) full days before the effective date of the employee's release.
>
> 2422.3 A notice shall not be issued less than thirty (30) days before the effective date of the employee's release.
>
> 2422.5 An agency shall not retain an employee beyond the end of the notice period.
>
> 2422.6 The notice to the employee shall specify the effective date of the employee's release from his or her competitive level.
>
> 2422.8 A reduction-in-force action shall not be taken before the effective date of a notice.

The notice is dated October 2, 2009 and provided that "beginning immediately, [Employee] will be on paid administrative leave until November 2, 2009, the effective date of [his] separation." The notice explained that Employee may receive severance pay. It also stated that he may be eligible to retire in lieu of being separated. It provided Employee's appeal rights and that because he was separated as the result of a RIF, he would receive priority re-employment consideration.[26]

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[26] *District of Columbia Schools' Answer to Employee's Petition for Appeal*, Tab #4 (January 7, 2010). As it relates to priority re-employment, the Superior Court for the District of Columbia held in *Webster v. District of Columbia Public Schools*, 2012 CA 006364 P(MPA), p. 8 (D.C. Super. Ct. December 9, 2013) that in accordance with D.C. Official Code § 1-624.08(h) and DPM section 2427.5, employees ". . . have a right to be added to the priority reemployment list . . . in light of the criteria under the procedures set forth in chapter 24 of the DCPM." *Petition for Appeal*, p. 7 (December 2, 2009). Employee's RIF notice provides the following:

> You may apply for any job vacancies at DCPS or within the District government that arise in the future. Employees separated pursuant to a reduction in force receive priority re-employment consideration, but are not guaranteed re-

Conclusion

Employee's RIF appeal has been thoroughly reviewed and analyzed at OEA. If, as Agency suggests, the general RIF statute should have been used, then the AJ provided substantial evidence in the first Initial Decision that the RIF action would be upheld under 5 DCMR § 1501. However, if the Abolishment Act was the correct statute in this matter, then Chapter 24 of the DPM is applicable. At the request of the Employee not to remand the matter to the AJ again, the Board provided a comprehensive analysis of Chapter 24 here. The RIF action is upheld under a review of either 5 DCMR § 1501 or DPM Chapter 24. Employee was provided with an opportunity to be heard. He received one round of lateral competition and adequate notice of the RIF. Therefore, we must deny Employee's Petition for Review of the Second Initial Decision on Remand.

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employment.

Thus, as Agency provided, it did comply with this statutory and regulatory requirements for the priority re-employment list, as was evidenced in Employee's RIF notice.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review of Second Initial Decision 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

March 22, 2018
Date