SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT
c/o Office of the Attorney General for the
District of Columbia
441 Fourth Street, NW, 1180 North
Washington, DC 20001

Petitioner,

v.

No. _____

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

Serve on: Sheila Barfield, Esquire
Executive Director
Office of Employee Appeals
955 L'Enfant Plaza, Suite 2500
Washington, D.C. 20024

Respondent.

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that the Metropolitan Police Department ("Petitioner" or "Agency") appeals to the Superior Court of the District of Columbia from the Initial Decision of the Office of Employee Appeals ("OEA" or "Respondent") issued on April 30, 2018, and all rulings encompassed therein, in the matter of Sheila Thomas-Bullock v. District of Columbia Metropolitan Police Department, OEA Matter No. 1601-0039-17. A copy of the Initial Decision is attached to this Petition as Attachment 1. The Initial Decision reversed the decision of Agency to terminate Shiela Thomas-Bullock ("Employee"). Petitioner seeks to have the Initial Decision reversed.

B. Description of Judgment or Order:

On April 18, 2017, Employee filed a Petition for Appeal with OEA, appealing Agency's decision to terminate her effective April 14, 2017. The Agency originally proposed action based on three charges: (1) the commission of an act which would constitute a crime, whether or not a court record reflects a conviction; specifically simple assault, (2) falsification of official records; specifically that the Employee deliberately filed a false police report, and (3) conduct unbecoming an officer; specifically, conduct that is considered immoral, indecent, lewd or disorderly. The charges were based upon an incident that occurred on December 27, 2015, while Employee was off-duty, whereby, while unprovoked, she physically attacked the victim causing serious injury to the victim's face, mouth and eye. After an Adverse Action Panel hearing was held, the Panel found the Employee guilty of the all three charges and recommended termination for the first charge.

Appeal briefs were filed at the OEA pursuant to *Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Following the submission of briefs, OEA Administrative Judge Michelle B. Harris issued an Initial Decision which reversed termination. The Administrative Judge found that while substantial evidence supported the Agency's findings, the Agency violated the "90-day Rule" pursuant to D.C. Code § 5-1031. Petitioner now appeals the Initial Decision of April 30, 2018.

C. Address of Petitioner:

District of Columbia Metropolitan Police Department
c/o Nada A. Paisant, Esquire
Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW, 1180 North
Washington, DC 20001

D. Names and addresses of other parties:

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

Serve on: Sheila Barfield, Esq.
Executive Director, OEA
955 L'Enfant Plaza, Suite 2500
Washington, D.C. 20024

E. Names and Addresses of Parties to be Served:

	Name	Address
1.	Office of Employee Appeals (Respondent)	Sheila Barfield, Esquire Executive Director, OEA 955 L'Enfant Plaza, Suite 2500 Washington, D.C. 20024
2.	Sheila Thomas-Bullock (Employee)	5612 Blaine Street, N.E. Washington, D.C. 20019
3.	John H. Schroth, Esquire (Counsel for Employee)	Pressler, Senftle & Wilhite, PC 1432 K Street, NW 12th Floor Washington, DC 20008

Dated: June 5, 2018

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

NADINE C. WILBURN
Chief Counsel and Senior Adviser
Personnel, Labor and Employment Division

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

/s/ Nada A. Paisant
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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:

Sheila Barfield, Esq.
Executive Director, OEA
955 L'Enfant Plaza, Suite 2500
Washington, D.C. 20024

John H. Schroth, Esquire
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1432 K Street, NW
12th Floor
Washington, DC 20005

/s/ Nada A. Paisant
NADA PAISANT
Assistant Attorney General

ATTACHMENT 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: SHEILA THOMAS BULLOCK, Employee v. D.C. METROPOLITAN POLICE DEPARTMENT, Agency	OEA Matter No. 1601-0039-17 Date of Issuance: April 30, 2018 Michelle R. Harris, Esq. Administrative Judge

John Schroth, Esq., Employee Representative
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 18, 2017, Sheila Thomas Bullock ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Metropolitan Police Department's ("Agency" or "MPD") decision remove her from service. On May 8, 2017, Agency filed its Answer to Employee's Petition for Appeal. Following a failed attempt at mediation, this matter was assigned to the undersigned Administrative Judge on August 21, 2017. On August 23, 2017, I issued an Order Convening a Prehearing Conference in this matter for September, 28, 2017. On September 6, 2017, Employee, by and through her counsel, filed a Consent Motion to Reschedule the Prehearing Conference. I issued an Order on September 7, 2017, granting Employee's Motion and rescheduling the Prehearing Conference to October 2, 2017.

On October 2, 2017, both parties appeared for the Prehearing Conference. During the Prehearing Conference, I found that because there was an Adverse Action Panel hearing in this matter, that OEA's review of this appeal was subject to the standard of review outlined in *Elton Pinkard v. D.C. Metropolitan Police Department,* 801 A.2d 86 (D.C. 2002). As a result, the parties were ordered to submit briefs addressing whether: (1) the Adverse Action Panel's decision was supported by substantial evidence; (2) whether there was a harmful procedural error; and (3) whether Agency's action was done in accordance with all laws and/or regulations. Parties were also directed to specifically address whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

On October 3, 2017, I issued an Order codifying the verbal order from the Prehearing Conference and setting the briefing schedule. Accordingly, Agency's brief was due on or before November 13, 2017, Employee's brief was due on or before December 15, 2017, and Agency had the option to submit a sur-reply brief by or before January 8, 2018. On November 7, 2017, Agency filed

a Consent Motion to Extend the Briefing Schedule. Accordingly, on November 9, 2017, I issued an Order granting Agency's Motion. As a result, Agency's brief was now due on or before November 21, 2017, Employee's Brief was due on or before December 22, 2017 and Agency had the option to submit a sur-reply Brief on or before January 12, 2018. Parties submitted all briefs in accordance with the prescribed deadlines. Additionally, on February 23, 2018, Employee, by and through her counsel, submitted a filing noting its intention to rely on a recent Superior Court Order of a case that was cited in her brief.[1] The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error;
3. Whether Agency's action was done in accordance with all applicable laws or regulations.
4. Whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

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.

[1] The case cited as *Metropolitan Police Department v District of Columbia Office of Employee Appeals* (In re: Alice Lee), Case No. 2017 CA 003525 P (MPA), which was filed on February 13, 2018. Employee indicated that this case affirms the OEA ruling in a matter it cited in her brief, *Alice Lee v MPD*, OEA Matter No. 1601-0087-15.

STATEMENT OF THE CHARGES

In a Final Notice of Adverse Action dated February 10, 2017, Agency terminated Employee from service based on the following:

Charge No 1: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offense shall promptly report, or have reported their involved to their commanding officers."

Specification No 1: In that on or about August 11, 2016, you pled guilty to Domestic Violence Simple Assault (Case #2016DVM000218) and agreed to a deferred sentencing plea agreement with the United States Attorney's Office (USAO).

Specification No 2: In that, on or about February 1, 2016, an arrest warrant charging you with Domestic Violence Simple Assault was issued by the District of Columbia, Superior Court Judge John Bayly. You were subsequently arrested on February 4, 2016.

Specification No 3: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband.

Specification No 4: In that, on December 27, 2015, in an unprovoked attack, you physically assaulted Ms. Tije Holland while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, causing serious injury to Ms. Holland's face, mouth and eye.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-17 which reads in part, "...falsification of official records or reports."

Specification No. 1: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC. You filed this report knowing it was not factual.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the

agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part 1-B-23 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd or disorderly manner...They shall be guilty of misconduct, neglect of duty, or conduct unbecoming to an officer and a professional..."

Specification No. 1: In that on December 27, 2015, while off duty and visiting the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, you, while unprovoked, physically attacked Ms. Tije Holland, who was also visiting the Barcode Club, causing serious injury to Ms. Holland's face, mouth and eye.

SUMMARY OF THE TESTIMONY

On December 29, 2016, Agency held an Adverse Action Panel hearing. During the hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of fact, as well as the transcript (hereinafter denoted as "Tr."), generated and reproduced as a part of the Adverse Action Panel hearing.

Sergeant Kathryn Skaluba ("Skaluba") (Tr. Pages 20-33)

Skaluba testified that she is a member of the Metropolitan Police Department. She previously worked with the Fifth District ("5D"), but is currently with the Fourth District. Skaluba testified that she was on duty the night of December 27, 2015, and that she was called out to Washington Hospital Center to interview the victim of an assault. Skaluba testified that the victim was Ms. Holland. Skaluba testified that she answered the call from a radio run, but while in route, the officer on scence indicated that the complainant was alleging misconduct from an a member of MPD.

Skalubua testified that Ms. Holland told her she was at a club with her boyfriend and saw his ex-wife. She said she was the struck in the face by the officer and possibly the officer's sister. Skaluba came to find out that the officer in question was MPD member Sheila Thomas Bullock. Following this interview, Skaluba testified that she contacted the Watch Commander and the Internal Affairs Division ("IAD"), and that ultimately she turned the case over to IAD. Skaluba testified that the only involvement she had was approving the incident offense report prepared by Officer Copeland, the responding officer and the person who had initial contact with the complainant. On cross-examination, Skaluba testified that she did not know if Ms. Holland called 9-1-1 on the night of the incident. Skaluba indicated that she was unaware of who called the police, but that she was dispatched to Washington Hospital Center.

Agent Kenneth Carter ("Carter") (Tr. Page 33 -63)

Carter testified that he is a member of the MPD Internal Affairs Division (IAD). He stated that he was on duty the evening of December 27, 2015, going into the early morning of December 28, 2015. Carter testified that he was contacted by Agent Tracye Malcolm who indicated that they were to respond to an investigation relating to Officer Sheila Thomas Bullock; specifically it was a call to investigate an assault. Carter stated that he and Agent Malcolm met at the Washington Hospital Center, who also advised him that Ms. Holland made a police report indicating that she had been assaulted earlier in evening. Carter testified that he interviewed Ms. Holland, who explained that she was at Barcode Lounge with her boyfriend, Antonio Bullock, who told her that Officer Sheila Thomas Bullock and her sister had walked in. Carter stated that Ms. Holland told him that she was assaulted by Officer Thomas and her sister Angela Thomas. Carter testified that Ms. Holland indicated that she was punched in the facial area. Carter also indicated that he interviewed Antonio Bullock, who indicated that while he did not see the altercation begin, but attempted to break it up. Carter testified that Mr. Bullock indicated that after the melee, Officer Sheila Thomas and her sister left the club.

Carter also testified that while at Washington Hospital Center, he noted that Ms. Holland was treated for abrasions and swilling in the face. Carter also confirmed that the interviews he conducted with Ms. Holland and Mr. Bullock were recorded. Carter testified that following the interview with Ms. Holland at Washington Hospital Center, he and Agent Malcolm then proceeded to locate Officer Thomas Bullock. Carter stated that they called Officer Thomas Bullock and then went to her residence in Prince George's County Maryland. Carter indicated that Agent Malcolm and Officer Thomas Bullock spoke and that at that time Officer Bullock was made aware that her police powers were revoked. Carter testified that he could not recall if Officer Thomas Bullock relayed that she had been assaulted during this visit.

On cross-examination Carter testified that IS numbers were assigned on December 28, 2015. He also indicated that he did conduct the interviews of Ms. Holland and Mr. Bullock at the Washington Hospital Center. Carter was also asked about what Ms. Holland indicated with regard to the relationship she had with Mr. Bullock. Carter testified that while he could not recall if Ms. Holland said that she had never met Officer Thomas Bullock, that she indicated that there had not been any previous confrontations between her and Officer Thomas.

Retired Agent Tracye Malcom ("Malcolm") (Tr. Pages 63-99)

Malcolm testified that she was previously employed by the Metropolitan Police Department for 25 years, and that prior to retirement she served in the Internal Affairs Division. Malcolm stated that she was on duty with IAD around December 27, 2015, through December 28, 2015. Malcolm testified that she was the on-call agent that evening and received a call from either a "CIC" or a Sergeant to come out to investigate an officer involved incident. Malcolm testified that she, along with her partner, Agent Carter were made aware that Officer Thomas Bullock had been involved in a fight with a lady at the Barcode Club in DC. Malcolm stated that she interviewed the victim and her boyfriend. Malcolm also testified that she went to the home of Officer Thomas Bullock to meet with her and revoke her police powers. During that visit, Malcolm testified that she told Officer Thomas Bullock that there was a criminal allegation. Malcolm stated that she recalled Officer Thomas Bullock asking about filing a police report and that she advised her to do exactly what a citizen

would do. Malcolm testified that Officer Thomas Bullock did not indicate that she had been assaulted during this interview.

Malcolm also testified that she interviewed Ms. Tije Holland and Mr. Antonio Bullock. Malcolm indicated that Ms. Holland said that Officer Thomas Bullock and her sister hit her in the face while at the club. Malcolm indicated that she did secure video of the assault. Malcolm also testified that injuries to Ms. Holland were noted, specifically to her face and lip. Malcolm also testified that she did not complete entire investigation, and that it was reassigned because she was retiring.

On cross examination, Malcolm testified that she could not remember the exact that she went to Officer Thomas Bullock's home, but that it was daylight when she arrived. Malcolm indicated that Officer Thomas Bullock was calm upon their arrival. Malcolm also testified that she applied for an arrest warrant for Officer Thomas on February 1, 2016 and that a subsequent arrest was made February 4, 2016. She also agreed that April 11, 2016 was when Officer Thomas entered into a deferred sentencing agreement with the U.S. Attorney's Office. Malcolm indicated that she was present for one hearing, and believed that she completed her work with the matter after initial interviews, and that she retired in June of that year.

Agent Trina Johnson ("Johnson") (Tr. Pages 113-126)

Johnson testified that she's been a member of the Metropolitan Police Department for eighteen years, and currently works in the IAD division. In November of 2016, Johnson testified that she assisted Agent Tilley with the interview of Officer Thomas as it related to the incident that took place inside a club in DC. Johnson testified that the criminal matter has been "dissolved." Johnson indicated that during the interview, Officer Thomas said that in December of 2015, she was involved in a physical altercation and that she was the first to strike. Johnson testified that during the course of this investigation, she recalled that Officer Thomas had made a report of assault to the 6th District on December 28, 2015, after her police powers had been revoked.

On cross examination, Johnson indicated that she had been with IAD since September 18th. She indicated that it was Sergeant Tilley who did the investigation on this case, and that he wrote the original report and wrote the addendum. Johnson testified that her first involvement with this case was on November 17, 2016, when she interviewed Officer Thomas.

Lieutenant Han Kim ("Kim") (Tr. Pages 131-149)

Kim testified that he is a member of the Metropolitan Police Department's Internal Affairs Division. Kim testified that he has been a member of MPD for twelve years. He stated that within IAD, he is the supervisor of Squad 3 and his primary duties are to do case reviews and review investigations once they're submitted for inaccuracies, identifying all witnesses and other items related to investigative needs. Kim indicated that during the time of his review, he also communicates with the IAD Agents. Kim indicated that he reviewed the investigation of Officer Thomas that was conducted by Agency Tilley. Kim indicated that he reviewed the final investigative report and addendum report; but could not recall what if any items he identified that needed to be addressed before the report was finalized. Kim also stated that he reviewed the report with regard to

the two findings of assault and the filing of a false police report. Kim testified that the basis for sustaining the assault was based on the account of the complainant, Ms. Holland.

Kim indicated the basis for sustaining the false police report was based on circumstances related to Officer Thomas reporting, and from her interview. Kim testified that Officer Thomas was not interviewed in this matter until the addendum report. Kim stated that the addendum report was prepared on November 21, 2016. Kim indicated that he believed the timing of this addendum was to allow Officer Thomas to come in and speak with them while her criminal case was still pending and once that case was disposed of, she came in to speak with them.

With regard to the filing of a false police report, Kim indicated that while Officer Thomas had many times to report an assault to other agents, she did not. Kim testified that he still agreed with the findings with regard to the false police report. On cross-examination, Kim testified that he was Agent Tilley's supervisor. He also indicated that Agent Tilley conducted the investigation, wrote the original report, the addendum and he made findings and recommendations.

Director William Sarvis, Jr. ("Sarvis") (Tr. Pages 171-179)

Sarvis testified that he is employed with the Metropolitan Police Department and is currently assigned as the Director of Medical Services. Sarvis indicated that he knew Officer Thomas both personally and professionally. Sarvis testified that he supervised Thomas when she was detailed to the Police and Fire Clinic on several occasions. Sarvis testified that Thomas always carried herself well and that she was always professional. Sarvis stated that he had never known Thomas to be violent or have a temper, nor did he have any occasion to counsel her for any such behavior. Sarvis testified that he thought that Thomas should be retained by the department; and that in consideration of progressive discipline, that there is another penalty suitable for this situation.

Sergeant Kenya Jackson ("Jackson") (Tr. Pages 182-192)

Jackson testified that she is a member of the Metropolitan Police Department, currently assigned to the Criminal Investigations Divisions 22nd District, Detectives Unit. Jackson testified that she has been a member of MPD for approximately 19 years. Jackson indicated that she knows Office Thomas and met her in the 2nd District. Jackson stated that Thomas was very hard working, loyal and very friendly. Jackson said Thomas was a pleasure to be around and she would welcome working with her again in MPD. On cross-examination Jackson testified that Officer Thomas was a colleague and friend. She indicated that she did know Officer Thomas' husband.

Ms. Monica Hill ("Hill") (Tr. Pages 198-206)

Hill testified that she is currently employed as a financial specialist at D.C. Homeland Security. Hill indicated that she has been friends with Officer Thomas for over 20 years. Hill testified that she is very loving and caring and that her general demeanor is pleasant. Hill testified that she believe that MPD should retain Officer Thomas because she is not a violent individual and is hard working. Hill indicated that she did know Mr. Bullock, and personally believed him to be pervert and

womanizer. On cross-examination Hill testified that she was aware that Officer Thomas and Mr. Bullock were going through a divorce.

Mr. Douglas Evans Sr., Esq. ("Evans") (Tr. Pages 210-216)

Evans testified that he is an attorney currently in private practice, and has been practicing for 27 years. Evans indicated that he has known Officer Thomas for a number of years, and had gotten to know her better within the past year. Evans testified that he found Officer Thomas to be a very genuine person and one who had a heartfelt concern for the community and always had a positive demeanor.

Officer Sheila Thomas ("Employee") (Tr. Pages 217-309)

Employee testified that she was employed with the Metropolitan Police Department. She indicated that she and Antonio Bullock ("Bullock") were married in January 2011. She stated that shortly after their marriage Bullock told her that he would need to turn himself into jail in North Carolina for a DUI. She indicated that initially she believed it to be a minor issue, however Bullock was ultimately incarcerated in North Carolina for the next four years, until March 2015. Then, in April 2015, while Bullock was not yet living at home, Employee called him and another woman answered. Employee indicated that the person who answered the phone was Ms. Tije Holland. Later, Employee came to find out that Mr. Bullock and Ms. Holland were in an extramarital relationship. Employee filed for divorce from Mr. Bullock and it was finalized at the end of December 2015. On the night of December 27, 2015, Employee testified that she and her sister were at the club, Bar Code. She stated that she had been there a while when she saw Mr. Bullock and Ms. Holland enter. At some point during the evening, Employee testified that all she can remember is that she hit Ms. Holland and essentially "blacked out". Employee testified that she was later visited at her home by IAD officers and was notified of the investigation of the assault and that her police powers were revoked.

Employee testified that she believed that Mr. Bullock hit her that evening, which is while she filed a police report, but admitted that the video evidence does not show that Mr. Bullock hit her. Employee indicated that she was later arrested in February of 2016 for the assault and entered into a deferred plea agreement in April of 2016. Employee testified that she completed her sentence in September of 2016. Employee testified that during the course of completing her sentence that she had to do community service and attend anger management courses. Employee indicated that she knew her actions were wrong, and that she now has learned better ways to channel her anger. Employee indicated that the circumstances of her marriage with Mr. Bullock and seeing him with Ms. Holland caused her anger. Employee testified that she does have better tools to help her with her anger and that before this she had never done anything like this.

Panel Findings

The Panel made the following findings of fact based on their review of the evidence presented at the hearing. The Panel found the following[2]:

1. Officer Sheila Thomas-Bullock was appointed to the Metropolitan Police Department on February 23, 2004. She is currently assigned to the Second District and detailed to the Court Liaison Division.
2. Officer Thomas-Bullock was married to Mr. Antonio Bullock until their divorce which was finalized on December 31, 2015.
3. Mr. Antonio Bullock was serving a prison sentence in North Carolina from February 2011 through March of 2015, during which he began a relationship with another woman, Ms. Tije Holland.
4. On the night of December 27, 2015, Officer Thomas-Bullock, accompanied by her sister Angela Thomas, initiated and unprovoked attacked on Ms. Holland inside of the Barcode nightclub.
5. Ms. Holland sustained injuries as a result of the assault by Officer Thomas-Bullock, for which she sought hospital treatment.
6. The MPD Internal Affairs Division began a criminal investigation into Officer Thomas-Bullock's actions.
7. Video surveillance footage from Barcode was recovered, showing the assault by Officer Thomas-Bullock.
8. Officer Thomas-Bullock was revoked of her police powers by Agents of IAD.
9. Subsequent to her police powers being revoked, Officer Thomas-Bullock filed a police report in the Sixth District, alleging that her ex-husband, Mr. Antonio Bullock, had assaulted her, knowing this to be false.
10. On February 1, 2016, an arrest warrant was obtained, charging Officer Thomas-Bullock with Simple Assault domestic violence.
11. On February 4, 2016, Officer Thomas-Bullock was arrested in connection with the arrest warrant.
12. On April 11, 2016, Officer Thomas-Bullock pled guilty to Simple Assault in D.C. Superior Court, and entered into a deferred sentencing agreement thought the United States Attorney's Office.
13. The criminal case was disposed in September 2016, after Officer Thomas-Bullock completed all terms of her deferred sentencing agreement.
14. Officer Thomas-Bullock was interviewed by the IAD following the conclusion of the criminal case, wherein Officer Thomas-Bullock admitted to the unprovoked assault on Ms. Tije Holland.

Upon consideration and evaluation of all of the testimony and factors, the Panel found that there was preponderance of evidence to sustain all three charges. Accordingly, the Panel found that with regard Charge Number 1, Specifications 1 and 2, that Employee was guilty; Specifications 3 and 4 were dismissed. With regard to Charge Number 2, Specification 1, Employee was found guilty, and lastly, with regard to Charge Number 4, Specification 1, Employee was also found guilty.

[2] Agency Answer at Tab 3 Adverse Action Panel Findings of Fact and Conclusion of Law (May 8, 2017).

In addition to making the aforementioned findings of facts, the Panel weighed the offenses according to the relevant *Douglas*[3] factors. The Panel concluded that the nature and seriousness of the offense, employee's job level and type of employment, the notoriety of the offense or its impact on the reputation of the Agency; the clarity with which employee was on notice of any rules that were violated; the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by employee or others; and the consistency of the penalty with any table of penalties, were all aggravating factors. Specifically, the Panel found that the incident was very serious and constituted a criminal offense in the District of Columbia.

Further, the Panel cited that the filing of the false police report raised questions about her fitness to carry out the duties and responsibilities of a law enforcement officer. The Panel considered the past disciplinary record and past work record to be mitigating factors in this matter. The Panel found that upon review of Employee's work history that there were no serious cases of misconduct, and that she had over twelve years with the department and was well liked and respected within the department. Finally, the Panel weighed the consistency of the penalty with those imposed upon other employees for similar offenses to be a neutral factor. Namely, the Panel found that the proposed penalty was consistent for similar misconduct among other employees. Based on their aforementioned findings, the Panel's final recommendation was that Employee be terminated for Charge 1, Specifications 1 and 2, and be suspended for thirty (30) days for Charge 2, Specification 1 and Charge 3, Specification 1.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department.*[4] According to the *Pinkard* decision, OEA has a limited role where a departmental hearing has been held. The D.C. Court of Appeals held that

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[3] *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.

[4] 801 A.2d 86 (D.C. 2002)

while OEA generally has jurisdiction over employee appeals from a final agency decision involving adverse actions under the CMPA[5], in a matter where a departmental hearing has been held:

> "OEA may not substitute its judgement for that of an agency. Its review of the agency decision...is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations."

Further, the Court of Appeals held that OEA's power to establish its own appellate procedures is limited by the agency's collective bargaining agreements. As a result, and in accordance with Pinkard, an Administrative Judge of OEA may not conduct a de novo hearing in an appeal before them, but rather, must base their decision on the record when all of the following conditions are met:

1. The appellant (employee) is an employee of the Metropolitan Police Department or the D.C. Fire and Emergency Medical Services Department;
2. The employee has been subject to an adverse action;
3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
4. The collective bargaining agreement contains language essentially the same as that found in Pinkard i.e. "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Department hearing"; and
5. At the agency level, employee appeared before a panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action of the deciding official that resulted in an adverse action being taken against employee.

In this case, Employee is a member of the D.C. Metropolitan Police Department (MPD) and was the subject of an adverse action; MPD collective bargaining agreement contains language similar to that found in Pinkard; and Employee appeared before an Adverse Action Panel, which held a hearing. Based on the documents of record, and the position of the parties as stated during the Prehearing Conference held in this matter and in the briefs submitted herein, the undersigned finds that all of the aforementioned criteria are met in this instant appeal. Accordingly, pursuant to *Pinkard*, OEA may not substitute its judgment for that of the Agency, and the undersigned's review of Agency's decision in this matter is limited to the determination of whether the Adverse Action Panel's findings were supported by substantial evidence, whether there was harmful error, and whether the action taken was done in accordance with applicable laws or regulations.

Whether Adverse Action Panel's Decision was supported by Substantial Evidence

Pursuant to Pinkard, the undersigned must determine whether the Adverse Action Panel's ("Panel") findings were supported by substantial evidence.[6] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] If

[5] *See* D.C. Code §§ 1-606.02 (a)(2). 1-606.03(a)(c); 1-606.04 (2001).
[6] *Elton Pinkard v. DC Metropolitan Police Department*, 801 A.2d at page 91. (2002).
[7] *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 at 985 (D.C. 2002).

the [Adverse Action Panel] findings are supported by substantial evidence, then the undersigned must accept them even if there is substantial evidence in the record to support findings to the contrary.[8]

After reviewing the record, and the arguments presented by the parties in their briefs submitted before this Office, the undersigned finds that the Adverse Action Panel met its burden of substantial evidence. The parties had an opportunity to present testimonial and documentary evidence and had the ability to call witnesses and to cross-examine witnesses during the Panel hearing. Employee had the opportunity to call any witnesses and was represented by counsel who cross-examined Agency's witnesses. Further, a review of the transcript indicated that the Panel was engaged in the hearing, asked relevant questions and made credibility determinations for the witnesses, supported by sufficient evidence in making those determinations. Additionally, the Panel considered and reviewed the *Douglas* factors in making its determinations and findings, and in sustaining the charges.

Whether there was harmful procedural error.

In accordance with *Pinkard* and OEA Rule 631.3, the undersigned is required to evaluate and make a finding of whether or not Agency committed harmful error. OEA Rule 631.3 provides that "notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect they agency's final decision to take action."

90-Day Rule

In the instant matter, Employee argues that the undersigned should reverse Agency's decision because Agency committed harmful procedural error by failing to commence the adverse action in accordance with the "90 Day Rule" pursuant to D.C. Code § 5-1031. The "90-Day Rule" requires agencies to initiate adverse actions against sworn members of the police force no later than 90 days from the date that Agency "knew or should have known of the act or occurrence constituting cause."[9] Agency argues that it adhered to the provisions of the 90 Day rule, and that even if there was a violation of the rule that it was *de Minimis,* and that the 90 Day rules is directory, rather than mandatory. Further, Agency argues that it could not commence adverse action against employee until the conclusion of her criminal matter so as not to impinge upon Employee's Fifth Amendment rights against self-incrimination.[10] D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

> **(a-1)(1)** Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that

[8] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1189 (D.C. 1989).
[9] *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017).
[10] Agency's Reply Brief at Page 7-9 (January 12, 2018).

the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

(2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.

(b) *If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.*(Emphasis Added)

The legislative purpose of the 90 Day Rule enacted by the D.C. Council first in 2004, and then updated in 2015, was to ensure that adverse actions against employees were commenced and administered in a timely manner.[11] Specifically, the Council cited that the 90-Day rule "protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time."[12] Additionally, Council cited that as it relates to MPD, this rule incentivizes the Agency to "follow up on allegations efficiently and to resolve disciplinary cases in a timely fashion."[13] Additionally, the D.C. Court of Appeals has found that the D.C. Council, in enacting this legislation, "sought to expedite the process and provide certainty with some degree of balance and flexibility."[14] As a result, the 90-Day rule provides guidance and timelines for the commencement of adverse actions.

At issue here is whether Agency, in administering the instant adverse action, adhered to the provisions of this law, specifically D.C. Code 5-1031 (b). Here, Employee avers that Agency violated the 90-day rule because they did not issue the Notice of Proposed Adverse Action ("NPAA") until August 12, 2016. Employee argues that the criminal investigation in this matter, conducted by the United States Attorney's Office ("USAO") ended with the arrest of Employee on February 4, 2016, and as a result, Agency's August 12, 2016 notice was untimely. Agency argues that the end of the criminal investigation was not complete until Employee pled guilty and entered into a Deferred Sentencing Agreement ("DSA") on April 11, 2016. Agency argues that the criminal investigation was ongoing, and was "made clear by the fact that instead of proceeding to trial, the USAO allowed Employee an opportunity to plead guilty to Simple Assault pursuant to a Deferred Sentencing Agreement ("DSA") on April 11, 2016."[15] Agency further asserts that because a DSA is an agreement where the "USAO agrees to defer disposition of the criminal case until such time as the defendant completes requirements"; and if defendant completes the requirements, the USAO will enter a "nolle-prosequi" which is defined by the USAO that the Government would no longer seek

[11] Employee Brief at Page 21 and Exhibit 5. (December 22, 2017).
[12] *Id.*
[13] *Id.*
[14] *D.C. Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419, 425-526 (D.C. 2010).
[15] Agency's Reply Brief at Page 3 (January 12, 2018).

prosecution"[16]; that its issuance of the Notice of Proposed Adverse Action on August 12, 2016, was 86 business days after the plea agreement, and as a result, is not a violation of the 90-Day rule.[17]

Employee argues that it is not enough for Agency to suggest that an investigation is ongoing.[18] Employee avers that it is insufficient that Agency "claims that Officer Thomas was the subject of criminal investigation by the USAO up until the plea agreement on April 11, 2016;" and argues that MPD has the burden to of proof to *show* that there was an actual criminal investigation occurring up until April 11, 2016.[19] Employee asserts that Agency has failed to show that any criminal investigation was ongoing following the February 4, 2016, arrest of Employee. As a result, Employee avers that the Notice of Proposed Action ("NPAA") was untimely and in violation of the 90-Day Rule because it was issued 135 days after the arrest warrant was issued, and 132 after the warrant was served and Employee was arrested.

Both parties cite to the D.C. Court of Appeals *Jordan*[20] case, wherein the Court of Appeals discussed the 90-Day Rule and the tolling during a criminal investigation. In *Jordan*, the Court of Appeals weighed the interpretation of the phrase "conclusion of a criminal investigation", under the then 45-Day rule cited as D.C. Code § 1-617(b-1). The Court of Appeals held that Superior Court and OEA erred in concluding that the criminal investigation in this matter ended with the submission of the report by the Inspector General. The Court held that neither entity cited to any binding cases that determined when a criminal investigation ends and that the Court of Appeals knew of none. However, the Court of appeals did hold that "the natural meaning of the statutory language, however, is that the *"conclusion of a criminal investigation" must involve an action taken by an entity with prosecutorial authority – that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense or decide that charges should not be filed (Emphasis Added)*."[21]

In the instant matter, Employee was investigated for simple assault that occurred on December 27, 2015. Agency assigned IS numbers to the matter in the early morning hours of December, 28, 2015. In its Briefs, Agency cites that following its criminal investigation, on January 8, 2016, an Agent with MPD referred the incident to the USAO for further criminal investigation.[22] Following that, an affidavit in support of an arrest warrant for Employee was prepared and a DC Warrant for Domestic Violence Simple Assault was issued by DC Superior Court Judge John Bayly on February 1, 2016.[23] Subsequently, Employee was arrested on February 4, 2016.

Based on the aforementioned, the undersigned finds that in these circumstances, Agency has not shown that a criminal investigation occurred after Employee's arrest on February 4, 2016. The undersigned finds that the mere notion that because the USAO elected to enter into a Deferred Sentencing Agreement with Employee exhibits an ongoing investigation, is not substantive to prove that a criminal investigation was ongoing between February 4, 2016, and April 11, 2016. The matter was referred to the USAO in January 2016, and it was later determined that an arrest for the charge of Simple Assault was warranted, which was executed on February 4, 2016. Pursuant to the D.C.

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[16] *Id.* at Page 5.
[17] *Id.*
[18] Employee's Brief at Page 11-12 (December 22, 2017).
[19] *Id.*
[20] *District of Columbia v District of Columbia Office of Employee Appeals and Robert L. Jordan*, 883 A.2d 124 (2005).
[21] *Id.* at 128.
[22] Agency Brief at Page 3 (November 21, 2017).
[23] *Id.* at Exhibit 1.

Court of Appeals holding in *Jordan* that the end of an investigation "*must involve action taken by an entity with prosecutorial authority – that is the authority to review evidence and either charge an individual with commission of a criminal offense or decide that charges should not be file*;" the undersigned finds that the February 4, 2016, arrest date meets this standard. Here, the USAO was the prosecutorial authority that assessed and ultimately charged Employee of the offense of Domestic Violence Simple Assault, and as a result, Employee was arrested on February 4, 2016. The undersigned finds that the fact that Employee entered into a DSA on April 11, 2016, reflects a decision between the USAO and Employee with regard toward the final ***disposition of the criminal case*** and does not, without substantial evidence, indicate that a criminal investigation was ongoing between February 4, 2016 and April 11, 2016.

Further, Agency's argument that a violation of the 90-Day rule is *de Minimis* as the rule is directory and not mandatory, does not align with rulings with regard to this matter. OEA has held and Superior Court has affirmed, that "it is well-settled that the 90-day deadline is mandatory rather than a directory provision."[24] As a result, I find that Agency's issuance of the NPAA on August 12, 2016, was in violation of the 90-Day rule pursuant to D.C. Code §5-1031, as it was 132 days following the arrest of Employee on February 4, 2016, which the undersigned has determined reflects the end of the criminal investigation in this matter.

Due Process

Employee argues that Agency violated Employee's due process by not calling the complainant, Ms. Holland, or Mr. Bullock as witnesses during the panel hearing.[25] Further, Employee argues that the investigative report was improperly entered into the record since the agent who authored the report, Agent Tilley, was not presented at the hearing and made available for cross-examination. Agency argues that it did not violate Employee's due process rights by not calling Agent Tilley or Ms. Holland or Mr. Bullock. Employee argues that Agency violated her due process in that Employee was did not have a fair opportunity to present her case in accordance with the rulings of the Supreme Court.[26] Agency avers that the investigative report was reviewed by the panel and that they made their decision without Agent Tilley being present. Further, Agency argues that Employee was present for the hearing and was represented by counsel, and had the right to call and present witnesses as they determined.

The undersigned agrees with Agency. Here, there is no evidence to suggest that Employee was barred from calling Ms. Holland, Mr. Bullock or Agent Tilley as their own witnesses for the Adverse Action Panel Hearing. Further, Employee had the opportunity to cross-examine all witnesses and make objections to testimony as well as documentary evidence as presented during hearing. The Panel was engaged in the hearing and weighed all testimony and objections. Therefore, I find that Employee had the opportunity to present her case in a fair manner, and that Agency did not violate Employee's due process in this matter.

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[24] *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018. See also

[25] Employee's Brief at Page 27-28 (December 22, 2017).

[26] *Id.* at Page 26. citing *Lightfoot v District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006).

Whether Agency's action was done in accordance with applicable laws or regulations.

As outlined previously in this analysis, the undersigned finds that Agency failed to appropriately follow the 90-Day rule as enumerated in D.C. Code §5-1031 (b), in that it commenced its adverse action against Employee in an untimely manner. As previously stated it has been held that this provision is mandatory, not directory in nature and must be adhered to.[27] As a result I find that Agency's action was not administered in accordance with all applicable laws, rules and regulations. Agency has the burden of proof to show that its actions were executed in accordance with all applicable laws, rules and regulations, and for the aforementioned reasons, the undersigned finds that Agency has not met that burden.

Whether the Penalty Was Appropriate

Because I find that Agency committed harmful procedural error and failed to appropriately follow all applicable laws, rules and regulations, I further find that Employee's termination must be reversed.

ORDER

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

1. Agency's action of terminating Employee from service is **REVERSED.**
2. Agency shall reinstate Employee and reimburse Employee all back pay and benefits lost as a result of her termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

[27] *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018.

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:

Sheila Thomas Bullock
5612 Blaine Street, NE
Washington, DC 20019

John H. Schroth, Esq.
Pressler, Senftle & Wilhite, P.C.
1432 K St., NW
12th Floor
Washington, DC 20005

Nada Paisant, Esq.
441 4th St, NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

April 30, 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

DISTRICT OF COLUMBIA METROPPOLITAN POLICE DEPT.

C.A. No. 2018 CA 003991 P(MPA)

Vs.

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 HIRAM E PUIG-LUGO
Date: June 6, 2018
Initial Conference: 9:30 am, Friday, September 07, 2018
Location: Courtroom 317
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

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 003991 P(MPA) Judge Hiram E. Puig-Lugo **Next Event: Status Hearing** **Friday, March 29, 2019 at 9:30 a.m.**

OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on September 6, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision in the matter of *Sheila Thomas Bullock v. D.C. Metropolitan Police Department*, OEA Matter Number 1601-0039-17 (April 30, 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 9th 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:

Nada A. Paisant
Counsel for Petitioner

John H. Schroth
Counsel for Intervenor

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
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Exhibit 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
SHEILA THOMAS BULLOCK, Employee	OEA Matter No. 1601-0039-17
v.	Date of Issuance: April 30, 2018
D.C. METROPOLITAN POLICE DEPARTMENT, Agency	Michelle R. Harris, Esq. Administrative Judge

John Schroth, Esq., Employee Representative
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 18, 2017, Sheila Thomas Bullock ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Metropolitan Police Department's ("Agency" or "MPD") decision remove her from service. On May 8, 2017, Agency filed its Answer to Employee's Petition for Appeal. Following a failed attempt at mediation, this matter was assigned to the undersigned Administrative Judge on August 21, 2017. On August 23, 2017, I issued an Order Convening a Prehearing Conference in this matter for September, 28, 2017. On September 6, 2017, Employee, by and through her counsel, filed a Consent Motion to Reschedule the Prehearing Conference. I issued an Order on September 7, 2017, granting Employee's Motion and rescheduling the Prehearing Conference to October 2, 2017.

On October 2, 2017, both parties appeared for the Prehearing Conference. During the Prehearing Conference, I found that because there was an Adverse Action Panel hearing in this matter, that OEA's review of this appeal was subject to the standard of review outlined in *Elton Pinkard v. D.C. Metropolitan Police Department,* 801 A.2d 86 (D.C. 2002). As a result, the parties were ordered to submit briefs addressing whether: (1) the Adverse Action Panel's decision was supported by substantial evidence; (2) whether there was a harmful procedural error; and (3) whether Agency's action was done in accordance with all laws and/or regulations. Parties were also directed to specifically address whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

On October 3, 2017, I issued an Order codifying the verbal order from the Prehearing Conference and setting the briefing schedule. Accordingly, Agency's brief was due on or before November 13, 2017, Employee's brief was due on or before December 15, 2017, and Agency had the option to submit a sur-reply brief by or before January 8, 2018. On November 7, 2017, Agency filed

a Consent Motion to Extend the Briefing Schedule. Accordingly, on November 9, 2017, I issued an Order granting Agency's Motion. As a result, Agency's brief was now due on or before November 21, 2017, Employee's Brief was due on or before December 22, 2017 and Agency had the option to submit a sur-reply Brief on or before January 12, 2018. Parties submitted all briefs in accordance with the prescribed deadlines. Additionally, on February 23, 2018, Employee, by and through her counsel, submitted a filing noting its intention to rely on a recent Superior Court Order of a case that was cited in her brief.[1] The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error;
3. Whether Agency's action was done in accordance with all applicable laws or regulations.
4. Whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

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.

[1] The case cited as *Metropolitan Police Department v District of Columbia Office of Employee Appeals* (In re: Alice Lee), Case No. 2017 CA 003525 P (MPA), which was filed on February 13, 2018. Employee indicated that this case affirms the OEA ruling in a matter it cited in her brief, *Alice Lee v MPD*, OEA Matter No. 1601-0087-15.

STATEMENT OF THE CHARGES

In a Final Notice of Adverse Action dated February 10, 2017, Agency terminated Employee from service based on the following:

Charge No 1: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offense shall promptly report, or have reported their involved to their commanding officers."

Specification No 1: In that on or about August 11, 2016, you pled guilty to Domestic Violence Simple Assault (Case #2016DVM000218) and agreed to a deferred sentencing plea agreement with the United States Attorney's Office (USAO).

Specification No 2: In that, on or about February 1, 2016, an arrest warrant charging you with Domestic Violence Simple Assault was issued by the District of Columbia, Superior Court Judge John Bayly. You were subsequently arrested on February 4, 2016.

Specification No 3: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband.

Specification No 4: In that, on December 27, 2015, in an unprovoked attack, you physically assaulted Ms. Tije Holland while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, causing serious injury to Ms. Holland's face, mouth and eye.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-17 which reads in part, "...falsification of official records or reports."

Specification No. 1: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC. You filed this report knowing it was not factual.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the

agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part 1-B-23 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd or disorderly manner...They shall be guilty of misconduct, neglect of duty, or conduct unbecoming to an officer and a professional..."

Specification No. 1: In that on December 27, 2015, while off duty and visiting the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, you, while unprovoked, physically attacked Ms. Tije Holland, who was also visiting the Barcode Club, causing serious injury to Ms. Holland's face, mouth and eye.

SUMMARY OF THE TESTIMONY

On December 29, 2016, Agency held an Adverse Action Panel hearing. During the hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of fact, as well as the transcript (hereinafter denoted as "Tr."), generated and reproduced as a part of the Adverse Action Panel hearing.

Sergeant Kathryn Skaluba ("Skaluba") (Tr. Pages 20-33)

Skaluba testified that she is a member of the Metropolitan Police Department. She previously worked with the Fifth District ("5D"), but is currently with the Fourth District. Skaluba testified that she was on duty the night of December 27, 2015, and that she was called out to Washington Hospital Center to interview the victim of an assault. Skaluba testified that the victim was Ms. Holland. Skaluba testified that she answered the call from a radio run, but while in route, the officer on scence indicated that the complainant was alleging misconduct from an a member of MPD.

Skalubua testified that Ms. Holland told her she was at a club with her boyfriend and saw his ex-wife. She said she was the struck in the face by the officer and possibly the officer's sister. Skaluba came to find out that the officer in question was MPD member Sheila Thomas Bullock. Following this interview, Skaluba testified that she contacted the Watch Commander and the Internal Affairs Division ("IAD"), and that ultimately she turned the case over to IAD. Skaluba testified that the only involvement she had was approving the incident offense report prepared by Officer Copeland, the responding officer and the person who had initial contact with the complainant. On cross-examination, Skaluba testified that she did not know if Ms. Holland called 9-1-1 on the night of the incident. Skaluba indicated that she was unaware of who called the police, but that she was dispatched to Washington Hospital Center.

Agent Kenneth Carter ("Carter") (Tr. Page 33 -63)

Carter testified that he is a member of the MPD Internal Affairs Division (IAD). He stated that he was on duty the evening of December 27, 2015, going into the early morning of December 28, 2015. Carter testified that he was contacted by Agent Tracye Malcolm who indicated that they were to respond to an investigation relating to Officer Sheila Thomas Bullock; specifically it was a call to investigate an assault. Carter stated that he and Agent Malcolm met at the Washington Hospital Center, who also advised him that Ms. Holland made a police report indicating that she had been assaulted earlier in evening. Carter testified that he interviewed Ms. Holland, who explained that she was at Barcode Lounge with her boyfriend, Antonio Bullock, who told her that Officer Sheila Thomas Bullock and her sister had walked in. Carter stated that Ms. Holland told him that she was assaulted by Officer Thomas and her sister Angela Thomas. Carter testified that Ms. Holland indicated that she was punched in the facial area. Carter also indicated that he interviewed Antonio Bullock, who indicated that while he did not see the altercation begin, but attempted to break it up. Carter testified that Mr. Bullock indicated that after the melee, Officer Sheila Thomas and her sister left the club.

Carter also testified that while at Washington Hospital Center, he noted that Ms. Holland was treated for abrasions and swilling in the face. Carter also confirmed that the interviews he conducted with Ms. Holland and Mr. Bullock were recorded. Carter testified that following the interview with Ms. Holland at Washington Hospital Center, he and Agent Malcolm then proceeded to locate Officer Thomas Bullock. Carter stated that they called Officer Thomas Bullock and then went to her residence in Prince George's County Maryland. Carter indicated that Agent Malcolm and Officer Thomas Bullock spoke and that at that time Officer Bullock was made aware that her police powers were revoked. Carter testified that he could not recall if Officer Thomas Bullock relayed that she had been assaulted during this visit.

On cross-examination Carter testified that IS numbers were assigned on December 28, 2015. He also indicated that he did conduct the interviews of Ms. Holland and Mr. Bullock at the Washington Hospital Center. Carter was also asked about what Ms. Holland indicated with regard to the relationship she had with Mr. Bullock. Carter testified that while he could not recall if Ms. Holland said that she had never met Officer Thomas Bullock, that she indicated that there had not been any previous confrontations between her and Officer Thomas.

Retired Agent Tracye Malcom ("Malcolm") (Tr. Pages 63-99)

Malcolm testified that she was previously employed by the Metropolitan Police Department for 25 years, and that prior to retirement she served in the Internal Affairs Division. Malcolm stated that she was on duty with IAD around December 27, 2015, through December 28, 2015. Malcolm testified that she was the on-call agent that evening and received a call from either a "CIC" or a Sergeant to come out to investigate an officer involved incident. Malcolm testified that she, along with her partner, Agent Carter were made aware that Officer Thomas Bullock had been involved in a fight with a lady at the Barcode Club in DC. Malcolm stated that she interviewed the victim and her boyfriend. Malcolm also testified that she went to the home of Officer Thomas Bullock to meet with her and revoke her police powers. During that visit, Malcolm testified that she told Officer Thomas Bullock that there was a criminal allegation. Malcolm stated that she recalled Officer Thomas Bullock asking about filing a police report and that she advised her to do exactly what a citizen

would do. Malcolm testified that Officer Thomas Bullock did not indicate that she had been assaulted during this interview.

Malcolm also testified that she interviewed Ms. Tije Holland and Mr. Antonio Bullock. Malcolm indicated that Ms. Holland said that Officer Thomas Bullock and her sister hit her in the face while at the club. Malcolm indicated that she did secure video of the assault. Malcolm also testified that injuries to Ms. Holland were noted, specifically to her face and lip. Malcolm also testified that she did not complete entire investigation, and that it was reassigned because she was retiring.

On cross examination, Malcolm testified that she could not remember the exact that she went to Officer Thomas Bullock's home, but that it was daylight when she arrived. Malcolm indicated that Officer Thomas Bullock was calm upon their arrival. Malcolm also testified that she applied for an arrest warrant for Officer Thomas on February 1, 2016 and that a subsequent arrest was made February 4, 2016. She also agreed that April 11, 2016 was when Officer Thomas entered into a deferred sentencing agreement with the U.S. Attorney's Office. Malcolm indicated that she was present for one hearing, and believed that she completed her work with the matter after initial interviews, and that she retired in June of that year.

Agent Trina Johnson ("Johnson") (Tr. Pages 113-126)

Johnson testified that she's been a member of the Metropolitan Police Department for eighteen years, and currently works in the IAD division. In November of 2016, Johnson testified that she assisted Agent Tilley with the interview of Officer Thomas as it related to the incident that took place inside a club in DC. Johnson testified that the criminal matter has been "dissolved." Johnson indicated that during the interview, Officer Thomas said that in December of 2015, she was involved in a physical altercation and that she was the first to strike. Johnson testified that during the course of this investigation, she recalled that Officer Thomas had made a report of assault to the 6th District on December 28, 2015, after her police powers had been revoked.

On cross examination, Johnson indicated that she had been with IAD since September 18th. She indicated that it was Sergeant Tilley who did the investigation on this case, and that he wrote the original report and wrote the addendum. Johnson testified that her first involvement with this case was on November 17, 2016, when she interviewed Officer Thomas.

Lieutenant Han Kim ("Kim") (Tr. Pages 131-149)

Kim testified that he is a member of the Metropolitan Police Department's Internal Affairs Division. Kim testified that he has been a member of MPD for twelve years. He stated that within IAD, he is the supervisor of Squad 3 and his primary duties are to do case reviews and review investigations once they're submitted for inaccuracies, identifying all witnesses and other items related to investigative needs. Kim indicated that during the time of his review, he also communicates with the IAD Agents. Kim indicated that he reviewed the investigation of Officer Thomas that was conducted by Agency Tilley. Kim indicated that he reviewed the final investigative report and addendum report; but could not recall what if any items he identified that needed to be addressed before the report was finalized. Kim also stated that he reviewed the report with regard to

the two findings of assault and the filing of a false police report. Kim testified that the basis for sustaining the assault was based on the account of the complainant, Ms. Holland.

Kim indicated the basis for sustaining the false police report was based on circumstances related to Officer Thomas reporting, and from her interview. Kim testified that Officer Thomas was not interviewed in this matter until the addendum report. Kim stated that the addendum report was prepared on November 21, 2016. Kim indicated that he believed the timing of this addendum was to allow Officer Thomas to come in and speak with them while her criminal case was still pending and once that case was disposed of, she came in to speak with them.

With regard to the filing of a false police report, Kim indicated that while Officer Thomas had many times to report an assault to other agents, she did not. Kim testified that he still agreed with the findings with regard to the false police report. On cross-examination, Kim testified that he was Agent Tilley's supervisor. He also indicated that Agent Tilley conducted the investigation, wrote the original report, the addendum and he made findings and recommendations.

Director William Sarvis, Jr. ("Sarvis") (Tr. Pages 171-179)

Sarvis testified that he is employed with the Metropolitan Police Department and is currently assigned as the Director of Medical Services. Sarvis indicated that he knew Officer Thomas both personally and professionally. Sarvis testified that he supervised Thomas when she was detailed to the Police and Fire Clinic on several occasions. Sarvis testified that Thomas always carried herself well and that she was always professional. Sarvis stated that he had never known Thomas to be violent or have a temper, nor did he have any occasion to counsel her for any such behavior. Sarvis testified that he thought that Thomas should be retained by the department; and that in consideration of progressive discipline, that there is another penalty suitable for this situation.

Sergeant Kenya Jackson ("Jackson") (Tr. Pages 182-192)

Jackson testified that she is a member of the Metropolitan Police Department, currently assigned to the Criminal Investigations Divisions 22nd District, Detectives Unit. Jackson testified that she has been a member of MPD for approximately 19 years. Jackson indicated that she knows Office Thomas and met her in the 2nd District. Jackson stated that Thomas was very hard working, loyal and very friendly. Jackson said Thomas was a pleasure to be around and she would welcome working with her again in MPD. On cross-examination Jackson testified that Officer Thomas was a colleague and friend. She indicated that she did know Officer Thomas' husband.

Ms. Monica Hill ("Hill") (Tr. Pages 198-206)

Hill testified that she is currently employed as a financial specialist at D.C. Homeland Security. Hill indicated that she has been friends with Officer Thomas for over 20 years. Hill testified that she is very loving and caring and that her general demeanor is pleasant. Hill testified that she believe that MPD should retain Officer Thomas because she is not a violent individual and is hard working. Hill indicated that she did know Mr. Bullock, and personally believed him to be pervert and

womanizer. On cross-examination Hill testified that she was aware that Officer Thomas and Mr. Bullock were going through a divorce.

Mr. Douglas Evans Sr., Esq. ("Evans") (Tr. Pages 210-216)

Evans testified that he is an attorney currently in private practice, and has been practicing for 27 years. Evans indicated that he has known Officer Thomas for a number of years, and had gotten to know her better within the past year. Evans testified that he found Officer Thomas to be a very genuine person and one who had a heartfelt concern for the community and always had a positive demeanor.

Officer Sheila Thomas ("Employee") (Tr. Pages 217 -309)

Employee testified that she was employed with the Metropolitan Police Department. She indicated that she and Antonio Bullock ("Bullock") were married in January 2011. She stated that shortly after their marriage Bullock told her that he would need to turn himself into jail in North Carolina for a DUI. She indicated that initially she believed it to be a minor issue, however Bullock was ultimately incarcerated in North Carolina for the next four years, until March 2015. Then, in April 2015, while Bullock was not yet living at home, Employee called him and another woman answered. Employee indicated that the person who answered the phone was Ms. Tije Holland. Later, Employee came to find out that Mr. Bullock and Ms. Holland were in an extramarital relationship. Employee filed for divorce from Mr. Bullock and it was finalized at the end of December 2015. On the night of December 27, 2015, Employee testified that she and her sister were at the club, Bar Code. She stated that she had been there a while when she saw Mr. Bullock and Ms. Holland enter. At some point during the evening, Employee testified that all she can remember is that she hit Ms. Holland and essentially "blacked out". Employee testified that she was later visited at her home by IAD officers and was notified of the investigation of the assault and that her police powers were revoked.

Employee testified that she believed that Mr. Bullock hit her that evening, which is while she filed a police report, but admitted that the video evidence does not show that Mr. Bullock hit her. Employee indicated that she was later arrested in February of 2016 for the assault and entered into a deferred plea agreement in April of 2016. Employee testified that she completed her sentence in September of 2016. Employee testified that during the course of completing her sentence that she had to do community service and attend anger management courses. Employee indicated that she knew her actions were wrong, and that she now has learned better ways to channel her anger. Employee indicated that the circumstances of her marriage with Mr. Bullock and seeing him with Ms. Holland caused her anger. Employee testified that she does have better tools to help her with her anger and that before this she had never done anything like this.

Panel Findings

The Panel made the following findings of fact based on their review of the evidence presented at the hearing. The Panel found the following[2]:

1. Officer Sheila Thomas-Bullock was appointed to the Metropolitan Police Department on February 23, 2004. She is currently assigned to the Second District and detailed to the Court Liaison Division.
2. Officer Thomas-Bullock was married to Mr. Antonio Bullock until their divorce which was finalized on December 31, 2015.
3. Mr. Antonio Bullock was serving a prison sentence in North Carolina from February 2011 through March of 2015, during which he began a relationship with another woman, Ms. Tije Holland.
4. On the night of December 27, 2015, Officer Thomas-Bullock, accompanied by her sister Angela Thomas, initiated and unprovoked attacked on Ms. Holland inside of the Barcode nightclub.
5. Ms. Holland sustained injuries as a result of the assault by Officer Thomas-Bullock, for which she sought hospital treatment.
6. The MPD Internal Affairs Division began a criminal investigation into Officer Thomas-Bullock's actions.
7. Video surveillance footage from Barcode was recovered, showing the assault by Officer Thomas-Bullock.
8. Officer Thomas-Bullock was revoked of her police powers by Agents of IAD.
9. Subsequent to her police powers being revoked, Officer Thomas-Bullock filed a police report in the Sixth District, alleging that her ex-husband, Mr. Antonio Bullock, had assaulted her, knowing this to be false.
10. On February 1, 2016, an arrest warrant was obtained, charging Officer Thomas-Bullock with Simple Assault domestic violence.
11. On February 4, 2016, Officer Thomas-Bullock was arrested in connection with the arrest warrant.
12. On April 11, 2016, Officer Thomas-Bullock pled guilty to Simple Assault in D.C. Superior Court, and entered into a deferred sentencing agreement thought the United States Attorney's Office.
13. The criminal case was disposed in September 2016, after Officer Thomas-Bullock completed all terms of her deferred sentencing agreement.
14. Officer Thomas-Bullock was interviewed by the IAD following the conclusion of the criminal case, wherein Officer Thomas-Bullock admitted to the unprovoked assault on Ms. Tije Holland.

Upon consideration and evaluation of all of the testimony and factors, the Panel found that there was preponderance of evidence to sustain all three charges. Accordingly, the Panel found that with regard Charge Number 1, Specifications 1 and 2, that Employee was guilty; Specifications 3 and 4 were dismissed. With regard to Charge Number 2, Specification 1, Employee was found guilty, and lastly, with regard to Charge Number 4, Specification 1, Employee was also found guilty.

[2] Agency Answer at Tab 3 Adverse Action Panel Findings of Fact and Conclusion of Law (May 8, 2017).

In addition to making the aforementioned findings of facts, the Panel weighed the offenses according to the relevant *Douglas*[3] factors. The Panel concluded that the nature and seriousness of the offense, employee's job level and type of employment, the notoriety of the offense or its impact on the reputation of the Agency; the clarity with which employee was on notice of any rules that were violated; the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by employee or others; and the consistency of the penalty with any table of penalties, were all aggravating factors. Specifically, the Panel found that the incident was very serious and constituted a criminal offense in the District of Columbia.

Further, the Panel cited that the filing of the false police report raised questions about her fitness to carry out the duties and responsibilities of a law enforcement officer. The Panel considered the past disciplinary record and past work record to be mitigating factors in this matter. The Panel found that upon review of Employee's work history that there were no serious cases of misconduct, and that she had over twelve years with the department and was well liked and respected within the department. Finally, the Panel weighed the consistency of the penalty with those imposed upon other employees for similar offenses to be a neutral factor. Namely, the Panel found that the proposed penalty was consistent for similar misconduct among other employees. Based on their aforementioned findings, the Panel's final recommendation was that Employee be terminated for Charge 1, Specifications 1 and 2, and be suspended for thirty (30) days for Charge 2, Specification 1 and Charge 3, Specification 1.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department.*[4] According to the *Pinkard* decision, OEA has a limited role where a departmental hearing has been held. The D.C. Court of Appeals held that

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[3] *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.

[4] 801 A.2d 86 (D.C. 2002)

while OEA generally has jurisdiction over employee appeals from a final agency decision involving adverse actions under the CMPA[5], in a matter where a departmental hearing has been held:

> "OEA may not substitute its judgement for that of an agency. Its review of the agency decision...is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations."

Further, the Court of Appeals held that OEA's power to establish its own appellate procedures is limited by the agency's collective bargaining agreements. As a result, and in accordance with Pinkard, an Administrative Judge of OEA may not conduct a de novo hearing in an appeal before them, but rather, must base their decision on the record when all of the following conditions are met:

1. The appellant (employee) is an employee of the Metropolitan Police Department or the D.C. Fire and Emergency Medical Services Department;
2. The employee has been subject to an adverse action;
3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
4. The collective bargaining agreement contains language essentially the same as that found in Pinkard i.e. "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Department hearing"; and
5. At the agency level, employee appeared before a panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action of the deciding official that resulted in an adverse action being taken against employee.

In this case, Employee is a member of the D.C. Metropolitan Police Department (MPD) and was the subject of an adverse action; MPD collective bargaining agreement contains language similar to that found in Pinkard; and Employee appeared before an Adverse Action Panel, which held a hearing. Based on the documents of record, and the position of the parties as stated during the Prehearing Conference held in this matter and in the briefs submitted herein, the undersigned finds that all of the aforementioned criteria are met in this instant appeal. Accordingly, pursuant to *Pinkard*, OEA may not substitute its judgment for that of the Agency, and the undersigned's review of Agency's decision in this matter is limited to the determination of whether the Adverse Action Panel's findings were supported by substantial evidence, whether there was harmful error, and whether the action taken was done in accordance with applicable laws or regulations.

Whether Adverse Action Panel's Decision was supported by Substantial Evidence

Pursuant to Pinkard, the undersigned must determine whether the Adverse Action Panel's ("Panel") findings were supported by substantial evidence.[6] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] If

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[5] *See* D.C. Code §§ 1-606.02 (a)(2). 1-606.03(a)(c); 1-606.04 (2001).
[6] *Elton Pinkard v. DC Metropolitan Police Department*, 801 A.2d at page 91. (2002).
[7] *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 at 985 (D.C. 2002).

the [Adverse Action Panel] findings are supported by substantial evidence, then the undersigned must accept them even if there is substantial evidence in the record to support findings to the contrary.[8]

After reviewing the record, and the arguments presented by the parties in their briefs submitted before this Office, the undersigned finds that the Adverse Action Panel met its burden of substantial evidence. The parties had an opportunity to present testimonial and documentary evidence and had the ability to call witnesses and to cross-examine witnesses during the Panel hearing. Employee had the opportunity to call any witnesses and was represented by counsel who cross-examined Agency's witnesses. Further, a review of the transcript indicated that the Panel was engaged in the hearing, asked relevant questions and made credibility determinations for the witnesses, supported by sufficient evidence in making those determinations. Additionally, the Panel considered and reviewed the *Douglas* factors in making its determinations and findings, and in sustaining the charges.

Whether there was harmful procedural error.

In accordance with *Pinkard* and OEA Rule 631.3, the undersigned is required to evaluate and make a finding of whether or not Agency committed harmful error. OEA Rule 631.3 provides that "notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect they agency's final decision to take action."

90-Day Rule

In the instant matter, Employee argues that the undersigned should reverse Agency's decision because Agency committed harmful procedural error by failing to commence the adverse action in accordance with the "90 Day Rule" pursuant to D.C. Code § 5-1031. The "90-Day Rule" requires agencies to initiate adverse actions against sworn members of the police force no later than 90 days from the date that Agency "knew or should have known of the act or occurrence constituting cause."[9] Agency argues that it adhered to the provisions of the 90 Day rule, and that even if there was a violation of the rule that it was *de Minimis,* and that the 90 Day rules is directory, rather than mandatory. Further, Agency argues that it could not commence adverse action against employee until the conclusion of her criminal matter so as not to impinge upon Employee's Fifth Amendment rights against self-incrimination.[10] D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

> **(a-1)(1)** Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that

[8] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1189 (D.C. 1989).
[9] *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017).
[10] Agency's Reply Brief at Page 7-9 (January 12, 2018).

> the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.
>
> (2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.
>
> *(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.* (Emphasis Added)

The legislative purpose of the 90 Day Rule enacted by the D.C. Council first in 2004, and then updated in 2015, was to ensure that adverse actions against employees were commenced and administered in a timely manner.[11] Specifically, the Council cited that the 90-Day rule "protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time."[12] Additionally, Council cited that as it relates to MPD, this rule incentivizes the Agency to "follow up on allegations efficiently and to resolve disciplinary cases in a timely fashion."[13] Additionally, the D.C. Court of Appeals has found that the D.C. Council, in enacting this legislation, "sought to expedite the process and provide certainty with some degree of balance and flexibility."[14] As a result, the 90-Day rule provides guidance and timelines for the commencement of adverse actions.

At issue here is whether Agency, in administering the instant adverse action, adhered to the provisions of this law, specifically D.C. Code 5-1031 (b). Here, Employee avers that Agency violated the 90-day rule because they did not issue the Notice of Proposed Adverse Action ("NPAA") until August 12, 2016. Employee argues that the criminal investigation in this matter, conducted by the United States Attorney's Office ("USAO") ended with the arrest of Employee on February 4, 2016, and as a result, Agency's August 12, 2016 notice was untimely. Agency argues that the end of the criminal investigation was not complete until Employee pled guilty and entered into a Deferred Sentencing Agreement ("DSA") on April 11, 2016. Agency argues that the criminal investigation was ongoing, and was "made clear by the fact that instead of proceeding to trial, the USAO allowed Employee an opportunity to plead guilty to Simple Assault pursuant to a Deferred Sentencing Agreement ("DSA") on April 11, 2016."[15] Agency further asserts that because a DSA is an agreement where the "USAO agrees to defer disposition of the criminal case until such time as the defendant completes requirements"; and if defendant completes the requirements, the USAO will enter a "nolle-prosequi" which is defined by the USAO that the Government would no longer seek

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[11] Employee Brief at Page 21 and Exhibit 5. (December 22, 2017).
[12] *Id.*
[13] *Id.*
[14] *D.C. Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419, 425-526 (D.C. 2010).
[15] Agency's Reply Brief at Page 3 (January 12, 2018).

prosecution"[16]; that its issuance of the Notice of Proposed Adverse Action on August 12, 2016, was 86 business days after the plea agreement, and as a result, is not a violation of the 90-Day rule.[17]

Employee argues that it is not enough for Agency to suggest that an investigation is ongoing.[18] Employee avers that it is insufficient that Agency "claims that Officer Thomas was the subject of criminal investigation by the USAO up until the plea agreement on April 11, 2016;" and argues that MPD has the burden to of proof to *show* that there was an actual criminal investigation occurring up until April 11, 2016.[19] Employee asserts that Agency has failed to show that any criminal investigation was ongoing following the February 4, 2016, arrest of Employee. As a result, Employee avers that the Notice of Proposed Action ("NPAA") was untimely and in violation of the 90-Day Rule because it was issued 135 days after the arrest warrant was issued, and 132 after the warrant was served and Employee was arrested.

Both parties cite to the D.C. Court of Appeals *Jordan*[20] case, wherein the Court of Appeals discussed the 90-Day Rule and the tolling during a criminal investigation. In *Jordan*, the Court of Appeals weighed the interpretation of the phrase "conclusion of a criminal investigation", under the then 45-Day rule cited as D.C. Code § 1-617(b-1). The Court of Appeals held that Superior Court and OEA erred in concluding that the criminal investigation in this matter ended with the submission of the report by the Inspector General. The Court held that neither entity cited to any binding cases that determined when a criminal investigation ends and that the Court of Appeals knew of none. However, the Court of appeals did hold that "the natural meaning of the statutory language, however, is that the *"conclusion of a criminal investigation" must involve an action taken by an entity with prosecutorial authority – that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense or decide that charges should not be filed (Emphasis Added)*."[21]

In the instant matter, Employee was investigated for simple assault that occurred on December 27, 2015. Agency assigned IS numbers to the matter in the early morning hours of December, 28, 2015. In its Briefs, Agency cites that following its criminal investigation, on January 8, 2016, an Agent with MPD referred the incident to the USAO for further criminal investigation.[22] Following that, an affidavit in support of an arrest warrant for Employee was prepared and a DC Warrant for Domestic Violence Simple Assault was issued by DC Superior Court Judge John Bayly on February 1, 2016.[23] Subsequently, Employee was arrested on February 4, 2016.

Based on the aforementioned, the undersigned finds that in these circumstances, Agency has not shown that a criminal investigation occurred after Employee's arrest on February 4, 2016. The undersigned finds that the mere notion that because the USAO elected to enter into a Deferred Sentencing Agreement with Employee exhibits an ongoing investigation, is not substantive to prove that a criminal investigation was ongoing between February 4, 2016, and April 11, 2016. The matter was referred to the USAO in January 2016, and it was later determined that an arrest for the charge of Simple Assault was warranted, which was executed on February 4, 2016. Pursuant to the D.C.

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[16] *Id.* at Page 5.
[17] *Id.*
[18] Employee's Brief at Page 11-12 (December 22, 2017).
[19] *Id.*
[20] *District of Columbia v District of Columbia Office of Employee Appeals and Robert L. Jordan*, 883 A.2d 124 (2005).
[21] *Id.* at 128.
[22] Agency Brief at Page 3 (November 21, 2017).
[23] *Id.* at Exhibit 1.

Court of Appeals holding in *Jordan* that the end of an investigation "*must involve action taken by an entity with prosecutorial authority – that is the authority to review evidence and either charge an individual with commission of a criminal offense or decide that charges should not be file*;" the undersigned finds that the February 4, 2016, arrest date meets this standard. Here, the USAO was the prosecutorial authority that assessed and ultimately charged Employee of the offense of Domestic Violence Simple Assault, and as a result, Employee was arrested on February 4, 2016. The undersigned finds that the fact that Employee entered into a DSA on April 11, 2016, reflects a decision between the USAO and Employee with regard toward the final ***disposition of the criminal case*** and does not, without substantial evidence, indicate that a criminal investigation was ongoing between February 4, 2016 and April 11, 2016.

Further, Agency's argument that a violation of the 90-Day rule is *de Minimis* as the rule is directory and not mandatory, does not align with rulings with regard to this matter. OEA has held and Superior Court has affirmed, that "it is well-settled that the 90-day deadline is mandatory rather than a directory provision."[24] As a result, I find that Agency's issuance of the NPAA on August 12, 2016, was in violation of the 90-Day rule pursuant to D.C. Code §5-1031, as it was 132 days following the arrest of Employee on February 4, 2016, which the undersigned has determined reflects the end of the criminal investigation in this matter.

Due Process

Employee argues that Agency violated Employee's due process by not calling the complainant, Ms. Holland, or Mr. Bullock as witnesses during the panel hearing.[25] Further, Employee argues that the investigative report was improperly entered into the record since the agent who authored the report, Agent Tilley, was not presented at the hearing and made available for cross-examination. Agency argues that it did not violate Employee's due process rights by not calling Agent Tilley or Ms. Holland or Mr. Bullock. Employee argues that Agency violated her due process in that Employee was did not have a fair opportunity to present her case in accordance with the rulings of the Supreme Court.[26] Agency avers that the investigative report was reviewed by the panel and that they made their decision without Agent Tilley being present. Further, Agency argues that Employee was present for the hearing and was represented by counsel, and had the right to call and present witnesses as they determined.

The undersigned agrees with Agency. Here, there is no evidence to suggest that Employee was barred from calling Ms. Holland, Mr. Bullock or Agent Tilley as their own witnesses for the Adverse Action Panel Hearing. Further, Employee had the opportunity to cross-examine all witnesses and make objections to testimony as well as documentary evidence as presented during hearing. The Panel was engaged in the hearing and weighed all testimony and objections. Therefore, I find that Employee had the opportunity to present her case in a fair manner, and that Agency did not violate Employee's due process in this matter.

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[24] *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018. See also

[25] Employee's Brief at Page 27-28 (December 22, 2017).

[26] *Id.* at Page 26. citing *Lightfoot v District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006).

Whether Agency's action was done in accordance with applicable laws or regulations.

As outlined previously in this analysis, the undersigned finds that Agency failed to appropriately follow the 90-Day rule as enumerated in D.C. Code §5-1031 (b), in that it commenced its adverse action against Employee in an untimely manner. As previously stated it has been held that this provision is mandatory, not directory in nature and must be adhered to.[27] As a result I find that Agency's action was not administered in accordance with all applicable laws, rules and regulations. Agency has the burden of proof to show that its actions were executed in accordance with all applicable laws, rules and regulations, and for the aforementioned reasons, the undersigned finds that Agency has not met that burden.

Whether the Penalty Was Appropriate

Because I find that Agency committed harmful procedural error and failed to appropriately follow all applicable laws, rules and regulations, I further find that Employee's termination must be reversed.

ORDER

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

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Agency shall reinstate Employee and reimburse Employee all back pay and benefits lost as a result of her termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

[27] *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018.

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:

Sheila Thomas Bullock
5612 Blaine Street, NE
Washington, DC 20019

John H. Schroth, Esq.
Pressler, Senftle & Wilhite, P.C.
1432 K St., NW
12th Floor
Washington, DC 20005

Nada Paisant, Esq.
441 4th St, NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

April 30, 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

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 003991 P(MPA) Judge Hiram Puig-Lugo

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Sheila Thomas Bullock v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0039-17. The record consists of two volumes containing twenty-two (22) tabs.

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 27th day of July, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

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

District of Columbia Metropolitan Police Department, Petitioner	Case No. 2018 CA 003991 P(MPA)
v.	Judge Hiram Puig-Lugo
D.C. Office of Employee Appeals, Respondent.	

MOTION TO SEAL RECORD

Pursuant to Superior Court Civil Rule 5(e)(2), a party wishing to file a document containing the unredacted personal identifiers may submit a motion to file an unredacted document under seal. In accordance with Agency Rule 1(e), Respondent D.C. Office of Employee Appeals is required to file with the Clerk the entire agency record, including all of the original papers comprising that record. The original record contains documents that were submitted by the District of Columbia Metropolitan Police Department and Sheila Thomas-Bullock which include the names, addresses, telephone numbers, and photographs of the victim and several witnesses in this matter. In an effort to maintain the record in its original form and to protect the privacy of those involved, we humbly request that you grant our motion to seal the record to prevent it from being viewed by the public via the court's electronic filing system. Counsels for Petitioner and Sheila Thomas-Bullock do not object to this motion.

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 27th day of July, 2018, the forgoing Respondent D.C. Office of Employee Appeals' Motion to Seal Record was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Nada Paisant
Counsel for Petitioner

John H. Schroth
Counsel for Sheila Thomas-Bullock

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

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

RECEIVED
2018 JUL 26 PM 4:06
OFFICE OF EMPLOYEE APPEALS

GEORGIA STEWART
Plaintiff

vs.

OEA
Defendant

Case Number 2018 CA 002749 P (MPA)

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Georgia Stewart
Name of Plaintiff's Attorney

235 Quackenbos St, N.E.
Address
Washington, DC 20001
(202)-271-0780
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date 7/26/2018

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bản dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828로 전화주십시오 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

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

GEORGIA STEWART
Vs.
OEA

C.A. No. 2018 CA 002749 P(MPA)

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge WILLIAM M JACKSON
Date: April 23, 2018
Initial Conference: 9:30 am, Friday, July 27, 2018
Location: Courtroom 219
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

GEORGIA STEWART
Petitioner(s)

v.

OEA
Respondent(s)

RECEIVED
Civil Clerk's Office
APR 23 2018
Superior Court of the District of Columbia Washington, D.C.

MPA NO. 18-0002749

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** GEORGIA STEWART **appeals to the Superior Court of the District of Columbia from the order of** OFFICE OF Employee Appeals **(agency or official's name), issued on the** 22 **day of** MARCH, 2018. **A copy of that order or decision is attached to this petition.**

Description of Judgment or Order: Upholding the decision of the ALJ granting Agency's motion to Dismiss Employee's Petition

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: Agency in granting OHR's motion to Dismiss applied the wrong standard, and failed to grant Employee time.

B. **Address of Respondent, Agency or Official:** Ebony Robinson, Esq, OHR 441 Fourth Street, N.W, Suite 570 North, Washington, D.C. 20001

C. **Names and addresses of all other parties to the Agency's proceeding:**
GEORGIA STEWART 235 Quackenbos St, NE Wash. DC 20011
DC OFFICE OF Human Rights, 441 4th St, NW #570, WDC 20001

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

NAME	ADDRESS
1. GEORGIA STEWART	235 Quackenbos St, NE Washington, DC 20001
2.	
3. LASHEKA BROWN-BASSEY	955 L'Enfant Plaza, #2500 Washington, DC 20024
4. Office of Employee Appeals	

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

Print name of petitioner's attorney

Georgia A Stewart
Signature of petitioner's counsel or petitioner's signature

Address: 235 Quackenbos St, N.E, Wash. DC 20001
Bar No. _____ **Telephone No.** 202-271-0780

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
GEORGIA STEWART, Employee	OEA Matter No. J-0006-17
v.	Date of Issuance: March 22, 2018
D.C. OFFICE OF HUMAN RIGHTS, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Georgia Stewart ("Employee") worked as a Supervisory Equal Opportunity Specialist with the D.C. Office of Human Rights ("Agency"). On September 30, 2016, Agency issued a final notice of separation to Employee. The effective date of Employee's termination was October 15, 2016.[1]

On October 28, 2016, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She asserted that she was forced out of her Career Service status and placed in Management Supervisory Service ("MSS"). Employee believed that her failure to comply with the change in designation would have resulted in her termination. According to Employee, she was the only MSS employee targeted and terminated. Moreover, she argued that she was subjected to a hostile work environment. Therefore, Employee requested that she be reinstated

[1] *Petition for Appeal*, p. 7 (October 28, 2016).

and assigned to another Agency in a comparable position. Alternatively, she sought front pay for the three years she intended to work before she would have retired.[2]

Agency filed a Motion to Dismiss Employee's Petition for Appeal on November 21, 2016. It cited to *Jeffery E. McInnis v. D.C. Department of Parks and Recreation,* OEA Matter No. 1601-0138-15 (January 15, 2016), and stated that OEA has consistently held that it could not adjudicate the appeals of MSS employees, given their at-will status.[3] Agency explained that pursuant to D.C. Official Code § 1-609.51, individuals appointed to MSS are "not in the Career, Educational, Excepted, Executive, or Legal Service." In accordance with D.C. Official Code § 1-609.51 and 6B DCMR § 3813.3, MSS employees serve in an at-will appointment, and therefore, they are not subject to administrative appeals. Thus, it was Agency's position that MSS employees are statutorily excluded from the protections afforded to Career Service employees. Accordingly, it requested that Employee's petition be denied.[4]

On February 24, 2017, Employee filed her response to Agency's Motion to Dismiss. She, again, argued that she was Career status and not a MSS employee. According to Employee, Agency submitted an unsigned and undated position description as proof that she was a MSS employee. However, she explained that there were documents which proved that she was on the District Service pay scale. Therefore, it was her position that Agency's evidence was contradictory and failed to serve as uncontroverted evidence. Additionally, Employee argued that Agency was required to adhere to regulations to establish a MSS position. She also alleged

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[2] *Id.,* at 3-4.

[3] Agency explained that OEA also held that it did not have jurisdictional authority to review the appeals of MSS employees in *Charlotte Richardson v. Department of Youth Rehabilitation services,* OEA Matter No. J-0013-14 (January 9, 2014), *Kenneth Taylor v. Department of Housing and Community Development,* OEA Matter No. J-0042-12 (March 9, 2012), *Robert Ford v. D.C. Department of Parks and Recreation,* OEA Matter No. J-0402-10 (June 10, 2011), and *Penelope Minter v. D.C. Office of the Chief Medical Examiner,* OEA Matter No. J-0016-07, *Opinion and Order on Petition for Review* (July 22, 2009).

[4] *Agency's Motion to Dismiss Employee's Petition for Appeal and Request for Extension of Time to File Agency Answer,* p. 1-4 (November 21, 2016).

that she did not apply for the position of Supervisor of Mediation, MSS – MS-14. Thus, she argued that OEA did have jurisdiction to consider her matter.[5]

On March 13, 2017, Agency filed its reply to Employee's Response to Agency's Motion to Dismiss. Agency argued that pursuant to D.C. Official Code §1-609.58(a), "persons currently holding appointments to positions in the Career Service who meet the definition of 'management employee' as defined in § 1-614.11(5) shall be appointed to the Management Supervisory Service unless the employee declined the appointment." Agency contended that Employee did not exercise her right to decline her appointment in 2002, when she was converted to a MSS status. It asserted that Employee was also well aware of her training obligations and fulfilled this duty annually since her transition to the MSS status.[6] Accordingly, it requested that Employee's petition be denied and that Agency's Motion to Dismiss be granted.[7]

Employee replied to Agency's response on April 3, 2017. She argued that Agency failed to present evidence that her position was being converted to an MSS position or that she had the right to either decline or accept the position. Employee claimed that this was a violation of her due process rights. Therefore, it was her position that she was not an MSS employee.[8]

On April 12, 2017, the OEA Administrative Judge ("AJ") issued his Initial Decision. He held that District of Columbia Municipal Regulations ("DCMR") § 3813.1 provides that an appointment to a MSS position is an at-will appointment and an employee may be terminated at any time. The AJ found that from 2002 through 2015, Employee consistently completed mandatory and elective MSS courses. He opined that Employee's fulfillment of her annual

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[5] *Employee's Response to Agency's Motion to Dismiss,* p.1-7 (February 24, 2017).
[6] It is Agency's position that by completing annual, mandatory trainings, Employee demonstrated that she was aware of her MSS status. Agency maintained that OEA does not have jurisdiction to hear the appeal of an MSS employee.
[7] *Agency's Reply to Employee's Response to Agency's Motion to Dismiss,* p.1-9 (March 13, 2017).
[8] *Employee's Reply to Agency's Response,* p. 1-5 (April 3, 2017).

mandatory MSS training and courses demonstrated that she was fully aware of her MSS status. Furthermore, the AJ disagreed with Employee's argument that the District Service ("DS") salary schedule was not the appropriate pay plan for MSS employees. He explained that in accordance with District Personnel Manual ("DPM") § 1125.1, all employees appointed under Career, Legal, or Management Supervisory Services were paid under the DS Salary System or the Wage Service Rate System.[9] Furthermore, he determined that because DPM § 3813.3 provides that severance is awarded at the discretion of the Agency head, Employee's argument that she was entitled to severance lacks merit. Accordingly, the AJ dismissed the appeal for lack of jurisdiction.[10]

On May 17, 2017, Employee filed a Petition for Review of the Initial Decision. The petition raises four questions: whether the AJ erred as a matter of law in ruling on Agency's motion to dismiss; whether the AJ's decision is unsupported by preponderance of the evidence in the record; whether the AJ erred as a matter of law by not conducting an evidentiary hearing; and whether the AJ erred in his interpretation of statute. There are no supporting arguments provided by Employee; she merely raised the above-mentioned questions.[11]

Agency filed its response to Employee's Petition for Review on June 13, 2017. It argues that Employee's petition was filed untimely. Furthermore, Agency explains that the appeal fails to present evidence for the OEA Board to grant Employee's request, as required by OEA Rule 633.3. Therefore, it requests that the petition be denied.[12]

---

[9] Moreover, the AJ explained that the first open range salary schedule for MSS employees did not take effect until July 11, 2006. He noted that all of the documents submitted by Employee, dated after July 11, 2006, only listed a grade level reflected by the open range salary as established in D.C. Council Resolution 16-703. Thus, the AJ held that Employee was appropriately paid as an MSS employee under the DS pay plan.
[10] *Initial Decision*, p. 3-6 (April 12, 2017).
[11] *Employee Appeal of the Administrative Law Judge's Decision to the Board* (May 17, 2017).
[12] *Agency's Answer to Employee's Appeal of the Administrative Law Judge's Decision to the Board*, p. 1-3 (June 13, 2017).

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

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

Thus, Employee's petition not only needed to offer an objection to the Initial Decision, but those objections should have been supported by references to the record. As Agency provided, Employee raised questions, not objections in her Petition for Review. Furthermore, she did not provide any supporting evidence to substantiate the questions raised. Because of the lack of arguments presented, this Board has no basis upon which to grant Employee's petition. This Board has consistently held that merely disagreeing with the AJ's ruling is not a valid basis upon which a Petition for Review can be granted.[13] Accordingly, Employee's Petition for Review is denied.

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[13] *Michael Dunn v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for* Review (April 15, 2014); Gwendolyn *Gilmore v. D.C. Public Schools,* OEA Matter No. 1601-0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); *Garnetta Hunt v. Department of Corrections,* OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015); and *Carmen Faulkner v. D.C. Public Schools,* OEA Matter No. 1601-0135-15R16, *Opinion and Order on Petition for Review* (July 11, 2017).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

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

CERTIFICATE OF SERVICE

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

Georgia Stewart
235 Quackenbos Street, NE
Washington, DC 20011

Keith B. Grimes, Esq.
2008 Franklin Street, NE
Washington, DC 20017

Ebony Robinson, Esq.
DC Office of Human Rights
441 Fourth Street, NW
Suite 570 North
Washington, DC 20001

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

GEORGIA STEWART,
Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,
Respondent.

Case No. 2018 CA 002749 P(MPA)

Judge William M. Jackson

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Georgia Stewart v. D.C. Office of Human Rights,* OEA Matter No. J-0006-17. The record consists of one volume containing twenty-four (24) 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 17th day of August, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public D.C.
My commission expires June 14, 2021

RECEIVED

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OFFICE OF EMPLOYEE APPEALS

18-0000626

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FILED
CIVIL DIVISION BRANCH
JAN 31 2018
Superior Court of the District of Columbia Washington, D.C.

Roxy Guandique
1601-0017-17 Petitioner(s)

v.

MPA NO. _____

OEA/Department of Parks and Recreation
Respondent(s)

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** Roxy Guandique **appeals to the Superior Court of the District of Columbia from the order of** OEA Case #1601-0017-17 Judge Lim **(agency or official's name), issued on the** 4th **day of** January, 2018. **A copy of that order or decision is attached to this petition.**

Description of Judgment or Order: OEA affirmed the Agency terminated of Petitioner by Judge Joseph E. Lim OEA matter No. 1601-0017-17

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: OEA decision reversed and termination set aside and Petitioner be reinstated to work.

B. **Address of Respondent, Agency or Official:** DC Parks and Recreation 1209 U street NW, Washington, DC 20009

C. **Names and addresses of all other parties to the Agency's proceeding:** OEA - 955 L'Enfant Plaza, Washington, DC 20024

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

	NAME	ADDRESS
1.	Janea J. Hawkins	441 4th Street NW, Washington, DC 20001
2.	Kemi Morten	3825 South Capitol SW, Washington, DC 20032
3.		
4.		

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

Kemi Morten
Print name of petitioner's attorney

Signature of petitioner's counsel or petitioner's signature

Address: 1145 Southview Drive #101 Oxon Hill, MD 20745
Bar No. _____ **Telephone No.** 703-687-5244

P: 2018 CA 000626 P(MPA)
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OFFICE OF EMPLOYEE APPEALS

FILED
CIVIL ACTIONS BRANCH
JAN 31 2018
Superior Court of the District of Columbia Washington, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Roxy Guandique
Petitioner(s)

v.

OEA/Department of Parks and Recreation
Respondent(s)

18-0000626

MPA NO. _____

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** Roxy Guandique **appeals to the Superior Court of the District of Columbia from the order of** OEA Case #1601-0017-17 Judge Lim **(agency or official's name), issued on the** 4th **day of** January, 2018. **A copy of that order or decision is attached to this petition.**

Description of Judgment or Order: OEA affirmed the Agency terminated of Petitioner by Judge Joseph E. Lim OEA matter No. 1601-0017-17

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: OEA decision reversed and termination set aside and petitioner be reinstated to work.

B. **Address of Respondent, Agency or Official:** DC Parks and Recreation 1209 U street NW. Washington, DC 20009

C. **Names and addresses of all other parties to the Agency's proceeding:** OEA - 955 L'Enfant Plaza, Washington, DC 20024

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

	NAME	ADDRESS
1.	Janea J. Hawkins	441 4th Street NW, Washington, DC 20001
2.	Kemi Morten	3825 South Capitol SW. Washington, DC 20032
3.		
4.		

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

Kemi Morten
Print name of petitioner's attorney

Signature of petitioner's counsel or petitioner's signature

Address: 1145 Southview Drive #101 Oxon Hill, MD 20745
Bar No. _____ **Telephone No.** 703-687-5244

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

ROXY GUANDIQUE
Vs.
OEA et al

C.A. No. 2018 CA 000626 P(MPA)

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge JOHN M CAMPBELL
Date: July 23, 2018
Initial Conference: 10:30 am, Friday, August 24, 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
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

WILLIAM REDDEN JR
Vs.
DC OFFICE OF THE INSPECTOR GENERAL

C.A. No. 2018 CA 002968 P(MPA)

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge JOHN M CAMPBELL
Date: May 2, 2018
Initial Conference: 9:30 am, Friday, August 03, 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

FILED
CIVIL ACTIONS BRANCH
MAY 02 2018
Superior Court
of the District of Columbia
Washington, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

WILLIAM REDDEN, JR.
Petitioner(s)

v.

MPA NO. 18-0002968

D.C. OFFICE OF THE INSPECTOR GENERAL
Respondent(s)

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** WILLIAM REDDEN **appeals to the Superior Court of the District of Columbia from the order of** OFFICE OF EMPLOYEE APPEALS **(agency or official's name), issued on the** 24th **day of** APRIL, 20 18. **A copy of that order or decision is attached to this petition.**
Description of Judgment or Order: OPINION AND ORDER ON PETITION FOR REVIEW

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: AGENY WRONGFULLY TERMINATED ME BY KNOWINGLY SUBMITTING A FALSE DOUGLAS FACTOR WORKSHEET # 11 AWARE I WAS UNDER PSYCHIATRIC TREATMENT

B. **Address of Respondent, Agency or Official:** 717 14th St., NW, WASHINGTON D.C. 20005

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

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

NAME	ADDRESS
1. JANEA HAWKINS	441 4th St NW
2.	SUITE 1180N
3.	WASHINGTON D.C.
4.	

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

PRO BONO WILLIAM REDDEN
Print name of petitioner's attorney

William Redden
Signature of petitioner's counsel or petitioner's signature

Address: 1 LAUREL HILL RD UNIT A GREENBELT MD 20770
Bar No. ____ **Telephone No.** 240-676-4876

B: 2018 CA 002968 P(MPA)
64962169
: CAPDEA

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WILLIAM REDDEN, JR., Employee	OEA Matter No. 1601-0021-17
v.	Date of Issuance: April 24, 2018
OFFICE OF THE INSPECTOR GENERAL, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

William Redden, Jr. ("Employee") worked as an Investigator with the Office of the Inspector General ("Agency"). On November 8, 2016, Agency issued a Proposed Notice of Separation, charging Employee with "conduct prejudicial to the District government: unauthorized disclosure of information protected by statute." The charge stemmed from an August 31, 2016 incident wherein Employee faxed a hotline complaint from a prisoner to the same Federal Prison Camp that was the subject matter of the complaint.[1] According to Agency, Employee sent the fax without authorization, in violation of D.C. Official Code § 1-301-115a (b-1). On December 21, 2016, Employee was issued a Final Agency Decision. The effective date of

[1] Agency's hotline program is a mechanism which permits members of the public to anonymously report waste, fraud, abuse, or mismanagement to the Office of the Inspector General. Complaints may be called in or reported by way of a "Hotline Online Complaint Form."

Employee's termination was December 30, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 6, 2017. In his appeal, Employee argued that termination was unduly harsh and that Agency discriminated against him. Employee also stated that he had no previous disciplinary actions during his tenure. Thus, he opined that Agency's termination action was callous, cynical, and administratively improper. Consequently, Employee asked to be reinstated with back pay and benefits.[2]

Agency filed an Answer to Employee's Petition for Appeal on February 8, 2017. It asserted that Employee admittedly failed to follow procedures and policies by releasing a prisoner complaint to a federal prison without authorization. In addition, Agency provided that Employee was not terminated for discriminatory reasons. Accordingly, it requested that the termination action be upheld.[3]

An OEA Administrative Judge ("AJ") was assigned to the matter in June of 2017. On August 9, 2017, the AJ issued an Order Rescheduling a Prehearing Conference for August 23, 2017.[4] After the conference, the parties were ordered to submit briefs addressing whether Agency engaged in progressive discipline; whether termination was appropriate under District law and the Table of Appropriate Penalties; and whether Agency properly considered the *Douglas* factors in imposing its adverse action against Employee.[5]

In its brief, Agency stated that Employee attended a "Hotline Program Team Meeting" during which Employee was issued a Risk Assessments and Future Plans ("RAFP") handbook.[6]

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[2] *Petition for Appeal* (January 6, 2017).
[3] *Agency Answer to Employee's Petition for Appeal* (February 8, 2017).
[4] *Order Rescheduling Prehearing Conference* (August 9, 2017).
[5] *Post-Status Conference/Prehearing Order* (August 28, 2017).
[6] The RAFP Handbook, General Guidelines and Procedures, included the process for assessing hotline complaints referred to as "DART" or "Dismiss, Assist, Refer, Transfer." The handbook contained instructions for completing Complaint Analysis Forms, which hotline personnel were required to submit to RAFP management for

Agency explained that on April 5, 2016, Employee was provided with step-by-step instructions for processing complaints from federal prisoners, including completing and submitting Complaint Analysis ("CA") forms; submitting fax template forms for approval; and faxing approved complaints to the Department of Justice ("DOJ") hotline for investigation. According to Agency, on August 23, 2016, it received a complaint from an inmate at Alderson Federal Prison Camp, alleging retaliation by facility staff. The complaint was subsequently assigned to Employee, who met with RAFP Program Manager, Brandy Cramer, on August 31, 2016. During the meeting, Employee and Cramer discussed the Alderson complaint for possible referral to the DOJ. However, Agency stated that less than an hour later, Employee faxed the inmate's complaint directly to the prison camp from which it originated. Employee subsequently emailed Cramer to inform her of his actions. Thus, Agency argued that Employee's termination was taken for cause because his actions violated its policy regarding referrals of inmate complaints and unauthorized disclosure of confidential information. Agency further contended that it engaged in progressive discipline prior to removing Employee because he was given both verbal and written admonitions regarding his performance deficiencies. Lastly, it provided that the *Douglas* factors were properly considered in selecting the penalty of termination. Therefore, Agency requested that the AJ uphold Employee's termination.[7]

In response, Employee argued that Agency failed to engage in progressive discipline and maintained that its actions constituted harassment. Employee also asserted that he was demoted in his duties as an Investigator when Agency changed his position from an investigative nature to one of a data input clerk. While he admitted to faxing a prisoner complaint to the Alderson facility on August 31, 2016, Employee disputed that the act was done intentionally. Additionally,

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consideration and approval. Agency's RAFP employees were told that the handbook would become effective on February 29, 2016.

[7] *Agency's Brief in Support of Employee's Removal* (October 2, 2017).

Employee claimed that Agency should have made an effort to determine the actual consequences of his inadvertent error. In the absence of such, Employee reasoned that Agency could only speculate that an abstract or potential harm occurred to the complainant. With respect to the penalty, Employee submitted that Agency did not accurately consider the *Douglas* factors when instituting its termination action. He further stated that Agency discriminated against him, citing to an active case that he filed with the D.C. Office of Human Rights ("OHR"). As a result, Employee opined that his termination was improper.[8]

The AJ issued an Initial Decision on November 8, 2017. She first highlighted D.C Municipal Regulation ("DCMR") § 1605.2, which provides that a corrective or adverse action against an employee is appropriate when he or she cannot meet identifiable conduct or performance standards which adversely affect the integrity of government operations. The AJ agreed with Employee's argument that he unintentionally faxed an inmate complaint back to the originating prison facility without authorization. However, she noted that Employee still disclosed the identity of the complainant inmate, in violation of D.C. Official Code § 1-301.115. Additionally, the AJ determined that Employee received training on the procedures that were required to process complaints as an Investigator. Consequently, the AJ concluded that Agency established that it had cause to institute an adverse action against Employee.

With respect to Employee's claims of discrimination, the AJ stated that D.C. Official Code § 2-1411.02 specifically reserves complaints of unlawful discrimination to OHR. However, she clarified that OEA may exercise jurisdiction over claims of unlawful discrimination if the aggrieved employee contends that he or she was targeted for certain whistleblowing activities, or if the complaint alleged retaliation in a Reduction-in-Force ("RIF").[9] In reviewing Employee's

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[8] *Employee Brief* (October 4, 2017).
[9] *See El Amin v. District of Columbia Department of Public Works*, 730 A.2d 164 (D.C. 1999).

submissions, the AJ concluded that his claims did not allege any whistleblowing activities, and Agency's termination action was not retaliatory in nature. Therefore, she dismissed Employee's discrimination claims as meritless.

Concerning Employee's contention that he was demoted in his duties, the AJ held that complaints of this nature were considered grievances which fall outside the scope of OEA's jurisdiction. She further provided that the Omnibus Personnel Reform Act of 1998, D.C. Law 12-124, divested this Office of jurisdiction to adjudicate grievances, effective October 21, 1998. Accordingly, the AJ was unable to address Employee's argument.

With regards to the penalty, the AJ stated that under the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), OEA was tasked with determining whether the penalty selected was within the range allowed by the Table of Penalties; whether the agency considered all relevant factors; and whether there was a clear error of judgment by agency. In addition, the AJ relied on DCMR §1607.2 (a)(10) in determining that the penalty for a first offense for prejudicial conduct is reprimand to removal. Thus, she opined that Agency did not abuse its discretion in its selection of the penalty of termination. The AJ further concluded that Agency considered the relevant *Douglas* factors, discussed *infra*, in selecting the appropriate penalty.

Lastly, the AJ found Employee's contention that Agency failed to engage in progressive discipline to be unpersuasive. Under DCMR § 1601.5, steps that are typically included in a progressive discipline system include verbal counseling; reprimand; corrective action; and adverse action. However, the AJ noted that under § 1601.6, "[s]trict application of the progressive steps...may not be appropriate in every situation...." Therefore, she determined that Agency's management retained the right to evaluate each situation on its own merits, and it was permitted skip any or all of the progressive steps. Based on the foregoing, the AJ concluded that

Employee's termination should be upheld.[10]

Employee disagreed and filed a Petition for Review with OEA's Board on December 5, 2017. He asserts that the AJ's decision was not based on substantial evidence and that the Initial Decision failed to address each issue of law and fact properly raised on appeal. Specifically, Employee reiterates his version of events leading up to his termination, stating that he was incorrectly assigned in his position with RAFP. Employee also claims that the AJ was not able to make a fair decision regarding his termination without conducting an evidentiary hearing. He suggests that Agency engaged in a pattern of terminating an "abnormally high number of [a]t-[w]ill employees, some of considerable stature and tenure." Additionally, Employee disputes the AJ's reliance on Agency's assessment of the *Douglas* factors because his personal and stress-related programs were not adequately considered. While Employee states that he fully comprehends that his termination was based on the unauthorized disclosure of confidential information that did not require intent, he clarifies that the occurrence was a "single, unintentional incident after almost fifteen years [of] District government service." Employee also requests that this Board remand the matter to the AJ for the purpose of determining why Agency failed to place him on a Performance Improvement Plan ("PIP") prior to terminating him. He also requests that the OHR offer its legal opinion on the merits of this case.[11]

Agency filed a Response to Employee's Petition for Review on February 12, 2018. It argues that since there are no genuine issues of material fact, the AJ's decision to not hold an evidentiary hearing was warranted. Agency also maintains that OEA lacks jurisdiction to address Employee's claims of discrimination because OHR is the proper venue for adjudicating such matters. As such, it contends that the matter need not be remanded to the AJ, and asks this Board

[10] *Initial Decision* (November 8, 2017).
[11] *Petition for Review* (December 5, 2017).

to uphold the Initial Decision.[12]

Substantial Evidence

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), provides that Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, District Personnel Manual ("DPM") § 1603.2 states that disciplinary actions against an employee may only be taken for cause. 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.[13]

Evidentiary Hearing

Employee asks this Board to remand this matter to the AJ for the purpose of addressing his alleged misclassification as an Investigator. Employee also requests a hearing to provide proof that Agency was "using the ruse of offering [Employee] medical assistance...as a means of wrongfully terminating me."[14] Under OEA Rule 624.1, a party may request the opportunity for

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[12] *Agency's Answer to Petition for Review* (February 12, 2018).

[13] *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).

[14] Employee states that he provided information to the AJ regarding a meeting with Principal Deputy Inspector General, Marie Hart, to request the possibility of being transferred to the Investigations Unit. However, Employee's assertion that he was misclassified at the time of removal has no bearing on whether he committed the misconduct outlined in Agency's Proposed Notice of Termination. Further, this claim is classified as a grievance outside the purview of OEA's jurisdiction. Employee also cites to his recollection of events in relation to a November 18, 2015 incident wherein he was asked by Hart if he would be willing to undergo a psychiatric fitness for duty exam and was advised that members of the Metropolitan Police Department and D.C. Fire and Emergency Medical Services were on site, waiting to escort Employee from the premises. Employee states that Hart inquired about his employment status with Agency. According to Employee, Hart suggested that he should voluntarily resign in order to access his retirement funds. However, Employee offers only a recitation of alleged events, but provides no legal basis for establishing a nexus between Hart's statement and the misconduct for which he was terminated. Likewise,

an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading. However, OEA Rule 615.1, "[i]f, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law...the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings."

Here, the AJ determined that there were no genuine issues of fact that would warrant an evidentiary hearing. In his Petition for Review, Employee explicitly states that his "termination was based upon my unauthorized disclosure of confidential information that did not require intent." Thus, it is uncontroverted that Employee committed misconduct in violation of D.C. Official Code § 1-301.115a (b-1), and the AJ was given the discretion to rely on the documents of record in rendering his decision in this case. Further, he correctly concluded that Employee's claims relevant to discrimination were required to be adjudicated before OHR. Consequently, this Board finds Employee's argument to be unpersuasive.

Progressive Discipline

Employee argues that he should have been placed on a PIP prior to being terminated by Agency. Conversely, Agency provides that Employee was given "constant admonition and counseling, both verbal and written, in an attempt to correct Employee's deficiencies in performance."[15] DCMR § 1601.5 provides the steps that are typically included in a progressive discipline system. The steps include verbal counseling; reprimand; corrective action; and adverse action(s). DCMR § 1601.6 states that "[s]trict application of the progressive steps in §§ 1601.5 and 1610 may not be appropriate in every situation. Therefore, management retains the right to

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Employee's other assertions regarding his belief that Agency engaged in a scheme to terminate at-will employees are not relevant to this appeal, as Employee was in Career Service status at the time of his termination.

[15] *Agency's Brief in Support of Employee's Removal* at p. 5.

evaluate each situation on its own merits and may skip any or all of the progressive steps. However, deviation from the progressive disciplinary system is only appropriate when consistent with DCMR §§ 1606 and 1607."

Based on the foregoing, Agency was not required to place Employee on a PIP prior to instituting its termination action if it established the requisite cause for taking the adverse action and if the selection of the penalty was permitted under the applicable Table of Illustrative Penalties.

Cause

Employee was charged with violating D.C. Official Code § 1-301.115a (b-1), which states the following in pertinent part:

> The Inspector General shall not disclose the identity of any person who brings a complaint or provides information to the Inspector General, without the person's consent, unless the Inspector General determines that disclosure is unavoidable or necessary to further the ends of an investigation.

Additionally, 6B DCMR § 1607.2 (a)(10) provides the following:

> 1607.2 The illustrative actions in the following table are not exhaustive and shall only be used as a guide to assist managers in determining the appropriate agency action. Balancing the totality of the relevant factors established in § 1606.2 can justify an action that deviates from the penalties outlined in the table.
>
> (a) Conduct Prejudicial to the District Government
>
> (10) Unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or confidential information.

In his Petition for Review, Employee states that "I fully comprehend that my termination was based upon my authorized disclosure of confidential information that did not require intent...." Moreover, Agency has established by a preponderance of the evidence that Employee

violated D.C. Official Code § 1-301.115a (b-1) and 6B DCMR § 1607.2 when he faxed a federal inmate's anonymous complaint directly to the prison facility from which it originated. This conduct compromised the anonymity of Agency's process for receiving and processing complaints based on allegations of waste, fraud, and abuse. Employee also placed the aggrieved inmate at risk of retaliation, adversely affecting Agency's mission. Employee did not receive consent from Agency to disclose the inmate's complaint to the prison. Further, Employee has not claimed that disclosure was deemed unavoidable or necessary to further the ends of an investigation. Both Agency and Employee concede that intent is not required to prove a violation of § 1-301.115a. Employee's conduct violated statutory confidentiality rules and undermined the protection and anonymity of incarcerated complainants. Accordingly, this Board finds that there is substantial evidence in the record to support finding that Agency's adverse action was taken for cause.

Douglas Factors and Selection of Penalty

Employee argues that Agency did not accurately consider the *Douglas* factors when selecting the penalty of termination. Employee believes that the *Douglas* factor worksheet failed to note that he was having personal problems and was suffering from stress.[16] In *Douglas v. Veterans Administration*,[17] the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

> 1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

[16] *Petition for Review* at p. 2.
[17] 5 M.S.P.R. 280, 305-306 (1981).

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 the employee's ability to perform assigned duties;

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. Consistency of the penalty with any applicable agency table of penalties;

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.

This Board finds that Agency properly considered the *Douglas* factors in selecting the

penalty of termination. In its analysis, Agency classified three factors—mitigating circumstances, past corrective or adverse actions, and Employee's work record—as either neutral or mitigating.[18] Conversely, Agency found the remaining nine factors to be aggravating. While Employee disagrees with the assessment of the *Douglas* factors, this Board can find no credible evidence indicating that Agency abused its discretion. Likewise, Agency provided a lengthy explanation of *Douglas* factor number 11 (mitigating circumstances) in its analysis, ultimately deeming it a neutral factor.[19] Therefore, we will not disturb the AJ's ruling regarding such.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[20] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[21] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[22]

The Table of Illustrative Actions, found in 6B, Section 1607 of the DCMR, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. Under § 1607.2(a)(10), the penalty for a first offense for "[u]nauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or

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[18] *Agency's Answer to Petition for Appeal*, Tab 15.
[19] *Notice of Proposed Termination.*
[20] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[21] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[22] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

confidential information" is counseling to removal. As previously stated, Employee violated D.C. Official Code § 1-301.115 by releasing a hotline complaint to a federal prison facility without authorization. While this Board agrees that Employee's misconduct was not intentional or done with malice, we cannot ignore violations of District laws, rules, and regulations. Thus, the AJ correctly determined that penalty of termination was within the range allowed under the DCMR.

Conclusion

This Board finds that the Initial Decision was based on substantial evidence in the record. Agency has met its burden of proof in establishing that it had cause to charge Employee with "conduct prejudicial to the District government; unauthorized disclosure of information protected by statute." There is also substantial evidence in the record to support a finding that Agency properly considered the *Douglas* factors and selected a penalty allowable under the Table of Illustrative Penalties. While this Board agrees that Employee committed an isolated, unintentional act of misconduct, we must nonetheless leave Agency's selection of penalty undisturbed in the absence of a finding of abuse of discretion. Consequently, Employee's Petition for Review must be denied.

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

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:

William Redden, Jr.
1 A Laurel Hill Road
Greenbelt, MD 20770

Janea Hawkins, Esq.
441 4th St., NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

April 24, 2018
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ROXY GUANDIQUE,
Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS et al.,
Respondents.

Case No. 2018 CA 000626 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 *Roxy Guandique v. D.C. Department of Parks and Recreation,* OEA Matter No. 1601-0017-17. The record consists of two volumes containing twenty-five (25) 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 31st day of August, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
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Suite 2500
Washington, DC 20024
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ROXY GUANDIQUE Petitioner v. D.C. OFFICE OF EMPLOYEE APPEALS et al., Respondents.	Case No. 2018 CA 000626 P(MPA) Judge John Campbell

MOTION TO SEAL RECORD

Superior Court Rule 5-III(a)(1) provides that "[a]bsent statutory authority, no case or document may be sealed without a written court order. Any document filed with the intention of being sealed must be accompanied by a motion to seal or an existing written order." Moreover, pursuant to Superior Court Civil Rule 5(e)(2), a party wishing to file a document containing the unredacted personal identifiers may submit a motion to file an unredacted document under seal. In accordance with Agency Rule 1(e), Respondent D.C. Office of Employee Appeals is required to file with the Clerk the entire agency record, including all original papers comprising that record. The original record contains documents that were submitted by the Department of Parks and Recreation and Roxy Guandique which include the name, address, telephone number, and banking documents of a witness. In an effort to maintain the record in its original form and to protect the privacy of those involved, we humbly request that you grant our motion to seal the record to

prevent it from being viewed by the public via the court's electronic filing system. Counsels for Petitioner and Respondent Department of Parks and Recreation do not object to this motion.

Respectfully submitted,

Lasheka Brown Bassey

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2018, the forgoing Respondent D.C. Office of Employee Appeals' Motion to Seal Record was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Kemi Morton
Counsel for Petitioner

Connor Finch
Andrea Comentale
Counsels for Department of Parks and Recreation

Lasheka Brown Bassey

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ROXY GUANDIQUE,	)	
	)	
Respondent,	)	Civil Case No. 2018 CA 000626 P(MPA)
	)	Calendar 13
v.	)	Judge John M. Campbell
	)	
D.C. OFFICE OF EMPLOYEE APPEALS, et al,	)	
	)	
Respondents.	)	

ORDER

Upon consideration of the respondent D.C. Office of Employee Appeals' Motion to Seal Record, and the lack of opposition thereto, it is this 30th day of August, 2018, hereby

ORDERED, that the motion is GRANTED; and it is further

ORDERED, that the D.C. Office of Employee Appeals may file the agency record under seal.

John M. Campbell
Associate Judge

Copies to:
Kemi Morten, Esq.
Andrea Cometale, Esq.
Lasheka Brown, Esq.
Connor Finch, Esq.
Via CaseFileXpress