DISTRICT OF COLUMBIA COURT OF APPEALS
MEDIATION SCREENING STATEMENT
(Civil, Family & Probate appeals)

Appeal No. 18-CV-553 Superior Ct. No. CAP1104-17

1. Case caption: Joseph G. O'Rourke v. District of Columbia Office of Employee Appeals
2. Case type: Civil
3. Brief description of the facts that gave rise to the initial dispute: SEE ATTACHMENT
4. Nature of disposition below: The Superior Court affirmed the 2017 OEA decision that it did not have jurisdiction over O'Rourke's 2010 appeal of the 2010 termination action.
5. State concisely the principal issue(s) in this appeal and the standard of review governing each: The issue is whether OEA no longer has jurisdiction over O'Rourke's appeal of the termination action taken by MPD in 2010, on the grounds that the 2013 retroactive retirement action "nullified" the 2010 termination action. This Court reviews the OEA decision *de novo*. The standard of review is whether there is substantial evidence in the record to support the OEA action, and whether the OEA decision was arbitrary, capricious, an abuse of discretion or not in accordance with law.
6. If this appeal presents a new question of law, state the issue: Appellant believes that the issue set forth in 5 above is a new issue for OEA. However, OEA, pursuant to its normal practice, did not participate in the Superior Court proceedings.
7. Factors weighing in favor of or against mediation: OEA did not participate in the proceedings. Petitioner and Intervenor cannot determine by mediation the decisional issue regarding OEA's jurisdiction.

8. Describe any attempts to negotiate a resolution of this dispute since the decision being appealed was entered by the trial court: None, for the reason set forth in 7 above.

9. Name and phone number of opposing counsel: SEE ATTACHMENT

I certify that the above information is accurate to the best of my knowledge, and a copy of this document was (x) mailed ( ) faxed and mailed ( ) e-mailed ( ) hand-delivered to the person(s) listed below on *{date}* June 11, 2018

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Robert E. Deso
Signature

174185
Bar No.

(202) 822-6333
Telephone Number

Robert E. Deso
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JOSEPH G. O'ROURKE v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS
APPEAL NO. 18-CV-553

ATTACHMENT TO MEDIATION SCREENING STATEMENT

3. Brief description of the facts that gave rise to the initial dispute: The intervenor/agency Metropolitan Police Department (MPD) terminated petitioner/employee O'Rourke in 2010, while O'Rourke was pending disability retirement for an injury he had sustained in the performance of duty in 2006. O'Rourke timely appealed the MPD termination action to the Office of Employee Appeals (OEA) in 2010. The Police and Firefighters' Retirement and Relief Board (Retirement Board) had conducted a hearing in O'Rourke's disability retirement case in 2008, but did not issue a decision until after MPD had terminated O'Rourke in 2010. Then the Retirement Board dismissed O'Rourke's disability retirement case on the grounds that he was no longer a member of MPD because he had been terminated. O'Rourke appealed to the Ct. of Appeals under the APA. In 2012 the Ct. of Appeals ruled in his favor in *O'Rourke v. D.C. PFRRB,* 46 A.3d 378 (D.C. 2012). Pursuant to the Court's decision, in 2013 the Retirement Board retired O'Rourke for disability, retroactive to the date he was terminated by MPD in 2010. In 2017 OEA determined that it no longer had jurisdiction over O'Rourke's appeal of the MPD termination action because he had been retired retroactively to the date of the termination action. OEA stated that the retirement action "nullified" the termination action. O'Rourke appealed the OEA decision to dismiss his appeal on the grounds that he suffered adverse consequences from the MPD termination action, notwithstanding the retro active disability retirement. The Superior Court affirmed the OEA action. This appeal followed.

9. Name and phone number of opposing counsel:

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Intervenor

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I certify that the above information is accurate to the best of my knowledge, and a copy of this document was mailed, to the person(s) listed below on June 11, 2018 to:

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DISTRICT OF COLUMBIA COURT OF APPEALS

Joseph O'Rourke, Appellant, v. D.C. Office of Employee Appeals, Appellee.	Case No. 18-CV-553

APELLEE OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on June 28, 2018, Appellee Office of Employee Appeals submits that it relies on the final decision of this office in the matter of *Joseph O'Rourke v. Metropolitan Police Department*, OEA Matter No. 1601-0310-10R15 (January 24, 2017), 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
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CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system to the following on this 4th day of September, 2018:

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Respectfully submitted,

Lasheka Brown Bassey

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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: JOSEPH O'ROURKE, Employee v. METROPOLITAN POLICE DEPARTMENT, Agency	OEA Matter No. 1601-0310-10R15 Date of Issuance: January 24, 2017

OPINION AND ORDER
ON REMAND

This matter has been before this Board previously. Joseph O'Rourke ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency"). The effective date of Employee's removal was May 7, 2010.[1] On May 10, 2010, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA").[2] Agency responded on May 27, 2010, by filing the entire record that it relied on to make its decision to remove Employee. Included in the filing was the Agency Trial Board transcript.[3]

Before the OEA Administrative Judge ("AJ") issued his Initial Decision in this matter, the parties submitted Pre-hearing Statements and Briefs. Employee explained that prior to his

[1] *Petition for Appeal*, Attachment #1 (May 10, 2010).
[2] *Id.*, at 3.
[3] *Agency's Response to Employee's Petition for Appeal* (May 27, 2010).

termination, he was injured on July 1, 2007, while chasing a carjacking suspect. As a result of the injury, he was placed in a limited-duty, administrative position within Agency. On July 8, 2008, Agency referred Employee to the Police and Firefighter's Retirement Board for consideration of disability retirement benefits. However, before a decision was issued on Employee's disability retirement action, Agency issued its final decision to terminate him. Employee claimed that on August 26, 2010, the Retirement Board finally issued its decision denying him disability retirement as a result of his termination action on May 7, 2010. Employee subsequently appealed the Retirement Board's decision to the D.C. Court of Appeals which reversed the Retirement Board's decision and remanded the disability case for further consideration.[4]

On February 14, 2013, Employee submitted a brief which provided that the Retirement Board issued its final decision on his disability retirement. He asserted that in accordance with the final order, he was retroactively retired on May 7, 2010; thereby, nullifying his termination action which was effective on the same day. Employee contended that because Agency initiated the disability retirement process, then his retirement was involuntary. He provided that Agency unlawfully terminated him while his disability retirement action was pending. Therefore, the termination action was not in accordance with law or regulation, and there was harmful procedural error committed.[5]

The AJ issued an Order on March 4, 2013 requesting that both parties brief whether Employee voluntarily retired from his position based on the ruling in *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975), that for a retirement to be deemed involuntary, the employee

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[4] *Pre-hearing Statement of Employee*, p. 1-5 (August 29, 2012).
[5] *Notice of Filing and Motion for Issuance of Initial Decision*, p. 7-10 (February 14, 2013).

must show that agency imposed undue coercion, misrepresentation, or mistaken information.[6] On October 1, 2013, the AJ issued his Initial Decision on this matter. He ruled that Employee's disability retirement was voluntary because he failed to offer proof of coercion or misrepresentation. He further ruled that Employee went through great legal mechanisms to secure his disability retirement which voided OEA's jurisdiction. The AJ held that because OEA lacks jurisdiction over voluntary retirements, Employee's appeal must be dismissed for lack of jurisdiction.[7]

Employee filed a Petition for Review on October 25, 2013. He raised many of the same arguments that were raised in his March 18, 2013 brief. Additionally, Employee contended that the AJ misunderstood the disability retirement law and utilized an improper analogy to conclude that his retirement was voluntary. Further, he claimed that OEA did have jurisdiction over Agency's termination action. Accordingly, he requested back pay from the effective date of his disability retirement – May 7, 2010 – until February 6, 2013.[8]

On November 29, 2013, Agency filed its Response to Employee's Petition for Review. It argued that OEA lacked jurisdiction because Employee voluntarily retired. It provided that OEA was not required to follow the Retirement Board's determination of an involuntary retirement. Additionally, Agency claimed that the lawfulness of Employee's termination is moot.[9]

The OEA Board issued its Opinion and Order on January 22, 2015. It provided that

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[6] *Order* (March 4, 2013). Employee filed his response on March 18, 2013, and explained that in accordance with D.C. Official Code § 5-710, his retirement was involuntary because it was the result of a disability action that Agency initiated. He submitted several Court of Appeals cases which provided that when a disability retirement action is initiated by Agency, the burden is on it to prove that Employee is unable to perform useful and efficient service. Employee argued that this is different than the standard provided in *Christie*. *Brief of Employee in Response to Order Issued on March 4, 2013* (March 18, 2013).

Agency issued its response on April 2, 2013. It claimed that Employee's disability retirement is presumed to be voluntary because Employee failed to show that it was the result of coercion or misrepresentation. Consequently, Agency argued that OEA lacked jurisdiction to adjudicate Employee's appeal. *Agency's Brief in Response to Order Issued on March 4, 2013* (April 2, 2013).

[7] *Initial Decision* (October 1, 2013).

[8] *Petition for Review* (October 25, 2013).

[9] *Agency's Brief in Opposition of Employee's Petition for Review* (November 29, 2013).

typically OEA relied on *Christie* and held that for a retirement to be considered involuntary, an employee must establish that the retirement was due to Agency's coercion or misinformation upon which they relied. However, the Board stated that disability retirements are different and present a unique set of facts that the AJ failed to consider. The Board relied on the Merit Systems Protection Board's ("MSPB") ruling in *Vaughan v. Department of Agriculture,* 116 M.S.P.R. 493 (2011) and reasoned that a "different approach [must] be taken when addressing the question of voluntariness in the context of a disability retirement."

MSPB's rational in *Vaughn* was that "an appellant who meets the statutory requirements for disability retirement has no true choice between working (with or without accommodation) and not working . . . ." It further reasoned that "an employee who is unable to work because of a medical condition that cannot be accommodated simply does not have such a choice." As a result, retirement on the basis of a disability has to be analyzed differently than a typical retirement action, as Employee argued. Hence, the Board held that the approach by the AJ to utilize the ruling in *Christie* was an error and that the Initial Decision did not consider the proper standard to determine jurisdiction in this case. Therefore, the matter was remanded to the AJ for further consideration of this issue.[10]

On June 22, 2015, the AJ issued his Initial Decision on Remand. He highlighted that Employee's position changed from contesting his retirement to contesting his removal, which he alleged was done in concert with Agency and the Retirement Board. The AJ held that OEA was unable to provide Employee any relief in this matter. He reasoned that because Employee was placed on disability retirement on the same day of his removal, OEA's enabling statute does not allow for Employee to recover anything under the circumstances. The AJ also noted that

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[10] *Joseph O'Rourke v. Metropolitan Police Department,* OEA Matter No. 1601-0310-10, *Opinion and Order on Petition for Review* (January 22, 2015).

Employee did not believe that the *Vaughn* case was applicable. Accordingly, he ordered that the matter be dismissed for lack of jurisdiction.[11]

On Petition for Review, Employee argues that the Board's reliance on *Vaughn* was inapplicable. He argues that once the disability retirement process started, Agency had an obligation to complete it. Therefore, he contends that Agency violated the process by removing him before the disability retirement procedure was complete. Employee asserts that he only received forty percent of his pay from May 2010 until February 2013. It is his position that he would have received his entire pay if he was not wrongfully removed by Agency.[12] Therefore, he requested that OEA award back pay for that time period.[13]

On August 26, 2015, Agency filed its response to Employee's Petition for Review. It argues that OEA is not the proper forum to adjudicate Employee's claims. Moreover, it provides that Employee's retirement was effective the same day as his termination action. Finally, Agency notes that Employee's retirement did not occur until after his disciplinary investigation was complete. Therefore, it requests that his Petition for Review be denied.[14]

Even if this Board assumes that Employee's retirement was involuntary, we still cannot address the merits of the action against him because according to the record, his disability retirement was back-dated to the effective date of the removal action. Employee does not dispute that he did retire from Agency. In Agency's original removal action, Employee was terminated effective May 7, 2010. However, after an order from the D.C. Court of Appeals, Agency made Employee's disability retirement effective on May 7, 2010, which was the

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[11] *Initial Decision on Remand* (June 22, 2015).
[12] In a subsequent filing, Employee explains that if Agency maintained him in a limited duty status pending his disability retirement, then he would have received full pay and benefits. *Employee's Reply Brief*, p. 3 (October 19, 2015).
[13] *Petition for Review* (July 22, 2015).
[14] *Agency's Brief in Opposition of Petition for Review* (August 26, 2015).

effective date of his removal action. OEA has previously held that retirements that occur after a removal action are valid.[15] In *Ella Cuff v. Department of General Services*, OEA Matter No. 1601-0009-12, *Opinion and Order on Petition for Review* (March 29, 2016), this Board reasoned that when a retirement action is back-dated to the effective date of Employee's termination action, it essentially nullifies the termination. As a result, OEA no longer has jurisdiction over the appeal because there is no adverse action.

Additionally, as Agency contends, OEA cannot award retirement pay as it relates to the Retirement Board's decision. Employee argues that he only received forty percent of his retirement pay from May 2010 through February 2013. Moreover, he contends that he should have remained in a limited duty status to receive his full retirement pay and benefits. However, as Agency contends, OEA is not the proper forum to address this issue. OEA lacks jurisdiction over the percent of retirement pay awarded to employees or their employment status while they progress through the disability retirement process.

The removal matter, over which OEA had jurisdiction, was nullified. Moreover, OEA lacks the authority to adjust retirement awards handled by the Retirement Board. Therefore, we must uphold the AJ's decision and deny Employee's Petition for Review.

[15] *Hsiao Zen Lu v. Department of General Services*, OEA Matter No. J-0153-13 (November 25, 2013).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Vice Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

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

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. Either party may also appeal a decision on Petition for Review (also known as an Opinion and Order 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:

Joseph O'Rourke
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Katrina Hill
Clerk

January 24, 2017
Date

2019 Superior Court Lawsuits

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

PETITION FOR REVIEW OF AGENCY DECISION

CARMEN FAULKNER)
1002 Palmer Road)
Apt 6)
Fort Washington, MD 20744)
EMPLOYEE /PETITITONER)

2017 CA 005593 P(MPA)

Docket No _____MPA

)OAE Matter 1601-0135-15 R16

V)
)
DC PUBLIC SCHOOLS.)
1200 First Street, NE)
10th Floor)
Washington, DC 20002)
AGENCY)

PETITON FOR REVIEW OF AGENCY DECISISON

A NOTICE is hereby given that Petitioner Carmen Faulkner through her Attorney Clarissa Thomas Edwards, and CTEDWARDS, PC Petition to the Superior Court of the District of Columbia for review of the decision of Sheree L price, Chair of the Office of Employee Appeals Board dated July 11, 2017. A copy of that decision is attached. To this petition. The decision was serve via mail on Nicole Dillard counsel for Agency and Clarissa Edwards on July 11, 2017 by mail. Petitioner challenges the Final decision denying her petition for review where she asserted that the Agency errored in its initial decision of upholding the termination of the petitioners' job as a DC Public School Teacher. The basis for the petition for Review is that the Agency fired the employee based on an erroneous interpretation of law evidence and that the Agency failed to comply with the impact requirements.

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.**

Carmen Faulkner was employed with the Agency as a General Teacher. Ms. Faulkner was hired by DCPS on August 23, 2000. While a teacher at Savoy Elementary School, Ms. Faulkner was evaluated during the 2013-2014 and she was deemed Developing. She received her final impact rating on 2014-2015 and she was considered minimally effective. Impact rules require that immediately following an observation that teacher received a timely post observation conference. On December 5, 2014, Ms. Faulkner was out for a mastectomy. The Agency claim that they attempted to contact her while she was out with breast cancer. The petitioner requested that she wanted a new observation when she returned to work but she was not provided the same. The Petitioner retuned to work on January 2015 but never received any word from the Agency about her post observation interview which is required under the Impact rules. The Petitioner complained about not having her post observation conference and other issues at her school. As a result thereto, she was giving poor impact scores. On August 7, 2015 she was informed that she was being terminated by Chancellor Kay Henderson. On September 4, 2015, the Petitioner filed a petion for appeal with the Office of Employee Appeals based on her termination and failure to comply with the impact procedure, DC Code 28:1-304. The agency dismissed the petition for failure to prosecute. The petition filed a motion to reinstate the petition for good cause and the same was granted. The Administrative law Judge Monica Dohnji held a status conference and ordered the parties to brief the issue. After considering the brief, the ALJ Dohnji upheld the decision to terminate the petitioner. The petitioner filed a Petition for review with the Office of Employee Appeals Board on November 29, 2016. On July 11, 2017, the Board upheld the Agency's decision to terminate the Petitioner.

Petitioner seeks the following relief:

1. The reinstatement of her general position as a teacher send any promotion that she was entitled to and

2. An order for any and all back pay to the Petitioner, reasonable attorney fees any cost and any other relief deemed proper by the Court.

B. Address of Agency or Official

DC Public School

1200 First Street, NE

10th Floor

Washington, DC

Monica Donji
Senior Administrative Judge

Government of the District of Columbia

Office of Employee Appeals

1104 4th Street, SW

Suite 620 E

Washington, DC 20024

C. Name and Address of All other parties to the Agency Proceeding

Sheree L Price, Chairman of the Board.

Government of the District of Columbia

Office of Employee Appeals

1104 4th Street, SW

Suite 620 E

Washington, DC 20024 .

D. Name and address of parties for attorney to be served:

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Respectfully Submitted

/s/ Clarissa Thomas Edwards

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Clarissa Thomas Edwards hereby certify that a copy of this document was eseved on Nicole Dillard via eserve on August 10, 2017 and mailed to Monica Donji , Senior Administrative Judge and to Sheree L Price Chairperson for the Board for the Office of Employee Appeals served on the following parties via first class mail postage prepaid to :

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Senior Administrative Judge

Government of the District of Columbia

Office of Employee Appeals

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Sheree L Price, Chairman of the Board.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CARMEN FAULKNER
Vs.
DC PUBLIC SCHOOL

C.A. No. 2017 CA 005593 P(MPA)

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge ROBERT R RIGSBY
Date: August 11, 2017
Initial Conference: 10:00 am, Friday, December 01, 2017
Location: Courtroom 516
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

Caio.doc

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

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

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

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

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

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

Chief Judge Robert E. Morin

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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

CARMEN FAULKNER,

Petitioner,

v.

D.C. PUBLIC SCHOOLS,

Respondent.

Case No. 2017 CA 005593 P(MPA)

Judge Robert R. Rigsby

CERTIFICATE OF FILING.

I hereby certify that this is the true and correct official case file in the matter of *Carmen Faulkner v. D.C. Public Schools,* OEA Matter No. 1601-0135-15R16. The record consists of one volume containing twenty-three (23) 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 16th day of October, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

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

MICHAEL SKELLY
Vs. C.A. No. 2018 CA 002463 P(MPA)
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge NEAL E KRAVITZ
Date: April 13, 2018
Initial Conference: 9:00 am, Friday, July 13, 2018
Location: Courtroom 100
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

MICHAEL SKELLY, Petitioner v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 002463 P(MPA) Judge Neal E. Kravitz **Next Event: Status Hearing** **November 2, 2018 at 10:00 a.m.**

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on July 6, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Michael Skelly v. Metropolitan Police Department*, OEA Matter Number 1601-0001-16 (March 22, 2018) as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted

Lasheka Brown Bassey

Lasheka Brown Bassey
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2018, the forgoing Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Robert E. Deso

Andrea Comentale

Frank McDougald

Respectfully submitted,

Lasheka Brown Bassey

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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
MICHAEL SKELLY, Employee	OEA Matter No. 1601-0001-16
v.	Date of Issuance: March 22, 2018
METROPOLITAN POLICE DEPARTMENT, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Skelly ("Employee") worked as a Sergeant with the Metropolitan Police Department ("Agency"). On October 15, 2014, Agency issued a Notice of Proposed Adverse Action, charging Employee with engaging in conduct constituting a crime; failure to obey orders and directives issued by the Chief of Police; conduct unbecoming of an officer; and prejudicial conduct. The charges stemmed from Employee's arrest for receiving and filling prescriptions for multiple narcotics from different medical providers. Agency also alleged that Employee altered a prescription for Percocet and that he was untruthful in his communications with doctors regarding the prescriptions that he was taking. Employee subsequently requested to have an Adverse Action Panel ("Trial Panel") review the charges and specifications against him. After

holding an evidentiary hearing, the Trial Panel recommended that Employee be terminated based on each of the four charges. On June 2, 2015, Agency issued its Final Notice of Adverse Action, sustaining the Panel's recommendation. Employee's termination became effective on September 4, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 2, 2015. In his appeal, Employee argued that his termination was improper and requested that he be reinstated with back pay and benefits.[1] Agency filed its Answer to the Petition for Appeal on November 9, 2015. It denied that Employee was wrongfully terminated and requested a hearing.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter in January of 2016. On April 4, 2016, the AJ held a prehearing conference to assess the parties' arguments. During the conference, the AJ determined that an evidentiary hearing was not warranted. The parties were then ordered to submit briefs addressing whether the Trial Panel's decision was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Agency's termination action was taken in accordance with all applicable laws, rules, and regulations.[3]

In his brief, Employee alleged that Agency failed to state a specific offense in support of its assertion that he violated U.S. Code Title 21-843 because there was no evidence to prove that he was involved in deception and/or fraud. Employee also contended that he did not commit a crime by altering a prescription for Percocet and that this charge was based upon unsubstantiated hearsay testimony. He further stated that he did not violate Agency's drug policy because the directive does not prohibit employees from possessing or taking lawfully prescribed medications

[1] *Petition for Appeal* (October 2, 2015).
[2] *Agency Answer to Petition for Appeal* (November 9, 2015).
[3] *Order on Briefs* (May 26, 2016).

at work. Moreover, Employee opined that the conduct unbecoming charge could not be supported because the accompanying specifications erroneously relied on the credibility of Dr. Lastrapes, a Police and Fire Chief Physician ("PFC"), who did not testify at the Trial Panel and did not provide an affidavit or written statement.

Next, Employee posited that he was denied due process regarding Agency's allegation that he was less than truthful to PFC physicians because he was unable to adequately defend against the charge provided in Agency's proposed notice. Lastly, Employee claimed that the prejudicial conduct charge could not be sustained because there was no rule or regulation which prohibited him from continuing to take medications prescribed by his treating physicians. Therefore, Employee requested that the Trial Panel's decision be reversed and that Agency's termination action be overturned.[4]

In response, Agency asserted that its conclusions regarding Employee's misconduct were supported by substantial evidence. It stated that the evidence reflected the excessive amounts of controlled narcotics that Employee was taking and the unlawful methods by which he was able to obtain prescriptions for the drugs. In addition, Agency provided that the Trial Panel had the opportunity to observe each witness's demeanor and assess their credibility, ultimately determining that Employee did not provide credible testimony. Agency claimed that the act of engaging in a scheme to obtain controlled substances from different providers was criminal behavior and violated U.S. Code Title 21-843. Further, it argued that Employee committed misconduct by providing untruthful information to PFC physicians about the medications he was taking and the illnesses for which he was receiving treatment. As a result, Agency requested that the AJ affirm its termination action.[5]

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[4] *Employee Brief* (June 10, 2016).
[5] *Agency Brief* (July 27, 2016). Employee filed a Reply Brief on August 23, 2016, stating that the facts recited by

An Initial Decision was issued on May 17, 2017. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), OEA was limited to making a decision solely on the record if certain conditions were met.[6] Having determined that each condition set forth in *Pinkard* was satisfied, the AJ stated that the issues to be decided before OEA were whether the Trial Panel's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's termination action was done in accordance with applicable laws, rules, or regulations.[7]

Next, the AJ provided that Agency was not prevented from levying administrative charges against Employee for the same criminal violations which were previously rejected by federal prosecutors in D.C. and Virginia because they were expunged. The AJ noted that criminal charges were different in scope and nature from administrative charges. Thus, the declination letter issued by the U.S. Attorney's Office did not require that the corresponding administrative personnel charges be withdrawn.

Next, the AJ concluded that there was substantial evidence in the record to support a

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Agency did not support the charges and specifications against him. Employee also reiterated his previous arguments and maintained that Agency's charges were based entirely on unsubstantiated, irrelevant, and unreliable hearsay. *Employee Reply Brief* (August 23, 2016).

[6] *Initial Decision* (April 6, 2013). Under *Pinkard*, the following conditions must be met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
> 2. The employee has been subjected 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 [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing;" and
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

[7] *Id.* at 2.

finding that Employee engaged in a scheme to obtain controlled substances, in violation of General Order ("GO") 120.21, Attachment A, Part A-7. He stated that under U.S. Code Title 21-843, Employee's behavior constituted misconduct that would be deemed a crime. Similarly, the AJ stated that Employee's alteration of a prescription for Percocet was an act which constituted a crime. Consequently, he held that Charge No. 1 properly alleged misconduct and should be sustained.

With respect to the failure to observe orders charge, the AJ determined that Employee violated Agency's Drug Free Work Place Directive, which prohibits the use of controlled substances in the workplace. According to the AJ, the record reflected that Employee was taking excessive amounts of controlled substances while on duty and failed to notify Agency. Thus, he sustained Charge No. 2.

Regarding the conduct unbecoming accusation, the AJ provided that Agency properly charged Employee with misconduct after he was untruthful to Dr. Lastrapes about his regular physician being out of town in an effort to obtain a prescription. Additionally, the AJ stated that Employee was untruthful to PFC physicians about the controlled substances he was taking and the injuries and illnesses for which he was receiving treatment.

Concerning the prejudicial conduct charge, the AJ concluded that Agency properly alleged misconduct for each specification. He noted that Employee displayed a continuing pattern of obtaining controlled substances from several providers, even after being told by his treating physicians that his actions were problematic. The AJ also dismissed Employee's argument that the record failed to prove that he was guilty of diversion under 21 U.S.C. § 843. He emphasized that a reading of the statute's plain meaning only required a showing that a controlled substance was acquired by fraudulent means, not that the substance be obtained by

fraud and sold illegally. Further, the AJ noted that the Trial Panel correctly admitted and relied upon hearsay evidence during the evidentiary hearing, as such evidence is routinely permissible in administrative hearings. He also stated that the premise of Agency's adverse action was not that Employee was unlawfully prescribed controlled substances. Rather, the case against Employee was based on his acquisition of prescriptions through a devised scheme to obtain excessive amounts of controlled substances. Accordingly, the AJ concluded that the conduct of the treating physicians in prescribing medications to Employee was not the issue before the Trial Panel.

After examining the record, the AJ held that Agency's case was not based solely on the impeachable hearsay of a single witness, Agent Ikner, who was responsible for conducting the investigation into Employee's alleged misconduct. He opined that Agency's case was supported and corroborated by Agency's other witnesses, as well as the documentary evidence obtained from judicial bodies in surrounding jurisdictions.

Finally, the AJ held that the Trial Panel provided a detailed summary of the relevant evidence in its Findings of Fact and Conclusions of Law. He stated that the Panel was well within its right to assess witness credibility. While the AJ was sympathetic to Employee's need for painkillers due to his injuries, he ultimately concluded that the Trial Panel's findings were supported by substantial evidence. Consequently, Employee's termination was upheld.[8]

Employee disagreed and filed Petition for Review with OEA's Board. He argues that the Initial Decision is based on an erroneous interpretation of statute; that the AJ's conclusions of law were not based on substantial evidence; and that the Initial Decision failed to address all issues of law and fact that were properly raised in the appeal. Specifically, Employee asserts that

[8] *Initial Decision* (May 17, 2017). Neither party alleged that Agency committed a harmful procedural error or that it failed to conduct its adverse action in accordance with all applicable laws, rules, or regulations. Therefore, the AJ did not address these issues in his decision.

the AJ failed to address the requisite elements of the offense for each of the specifications contained in the charges levied against him, including identifying what evidence is considered relevant to each specification. He further states that the Initial Decision lacks compliance with the requisite judicial analysis procedures established by the Supreme Court and the Merit Systems Protection Board ("MSPB") pertinent to burden of proof, reliance on hearsay evidence, and the need for expert witness testimony. According to Employee, Agency failed to meet its burden of proof in showing that he used an excessive amount of controlled medications over the years or that he fashioned a "scheme" to improperly obtain the drugs. Lastly, he disputes the AJ's findings with respect to each of the charges and corresponding specifications provided in Agency's Notice of Proposed Adverse Action. Therefore, Employee asks this Board to reverse the Initial Decision.[9]

Agency filed a Brief in Opposition to Employee's Petition for Review on July 21, 2017. It claims that the Initial Decision is based substantial evidence and details arguments regarding why each charge and specification is supported by the record. Agency also reiterates its position that Employee engaged in a scheme to obtain excessive amounts of controlled substances for personal use; thereby, violating federal statute and Agency's policy related to drugs in the workplace. As such, Agency asks this Board to uphold the Initial Decision and deny Employee's Petition for Review.[10]

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[9] *Petition for Review* (July 21, 2017).
[10] *Agency's Opposition to Employee's Petition for Review* (July 21, 2017). Employee subsequently filed a Reply Brief on August 14, 2017, in which he responds to Agency's arguments regarding its position on the validity of the AJ's findings. On September 6, 2017, Agency filed a Motion to Strike Employee's Reply Brief, arguing that Employee was not permitted to file a Reply Brief to Agency's oppositional brief. Employee then filed an Opposition to Agency's Motion to Strike on September 20, 2017.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7

Agency's first charge is based on Employee's violation of GO 120.21 for "[c]onviction of any member of the force in any court of competent jurisdiction…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…." According to Agency, Specification No. 1 alleges that Employee violated U.S. Code Title 21-843 by receiving prescriptions for multiple narcotics from different providers and refilling them at various locations. However, Employee argues that the facts do not allege an actual violation of U.S. Code Title 21-843 or any other crime or misconduct which can constitute a basis for discipline. As a result, Employee claims that the AJ committed a clear error of law. U.S. Code Title 21-843 states the following in pertinent part:

> Whosoever knowingly and willfully executes, or attempts to execute, a scheme or artifice:

[11] *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).

> (1) To defraud any healthcare benefit program; or
> (2) To obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery or payment for health care benefits, items, or services…

Here, there is substantial evidence in the record to uphold the AJ's findings with respect to this specification. Employee posits that Agency erroneously relied upon his arrest for "Obtaining Drug: Forgery or Altered Prescription" because the charge was accepted and dismissed by an Arlington County Magistrate after the U.S. Attorney for the District of Columbia declined to prosecute Employee following the conclusion of its investigation. However, the language of GO 120.21 does not require a conviction to sustain a charge for "…conduct which would constitute a crime, whether or not a court record reflects a conviction…." Rather, the underlying conduct must be examined to determine whether the employee's behavior was criminal in nature.[12]

Agency and the Drug Enforcement Agency ("DEA") Task Force conducted a joint investigation in collaboration with the Internal Affairs Department ("IAD") to hold several interviews with the multiple doctors who treated Employee. The evidence "led investigators to believe that probable cause…substantiated [the] allegation that [Employee] was obtaining prescriptions through false pretense, seeking medical care from multiple providers and being prescribed the same narcotic medications in addition to narcotics in excess of what was

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[12] *See Fullord-Cuthbertson v. Department of Corrections*, OEA Matter No. 1601-0018-13R16, *Opinion and Order on Petition for Review* (June 6, 2017). On Petition for Review, OEA's Board addressed whether an arrest is required to sustain a charge for "any act which constitutes a criminal offense whether or not the act results in a conviction" under D.C. Municipal Regulation §1603.3(h). The Board agreed with the AJ's reasoning that the purpose of the crafting the law was to ensure that an employee who commits a criminal act, such as fraud in the unlawful collection of unemployment insurance benefits, can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against them.

needed."[13] The joint investigation also alleged that Employee was exploiting his health care insurance in a fraudulent manner, and utilized diversion tactics to obtain prescriptions in D.C., Maryland, and Virginia.

While it is true that he was never criminally convicted, Employee admitted to the Trial Panel that he refilled prescriptions prior to exhausting his current medication allowance in order to increase the original amount that was prescribed. Employee even acknowledged that he manipulated the system in order to refill prescriptions.[14] Further, Employee was prescribed medication from a physician after falsely informing the doctor that he suffered from Post-Traumatic Stress Disorder as a result of being a member of Agency's bomb squad.[15] This conduct violates U.S. Code Title 21-843 because Employee utilized false pretenses to obtain controlled substances. It should be noted that this Board agrees with Employee's supposition that the act of filling multiple prescriptions at different locations was not a criminal activity *per se*. However, obtaining said medications through unscrupulous methods and devises for the purpose of obtaining excessive amounts of narcotics is prohibited by statute. While he disagrees with the Panel's finding, there remains a considerable amount of evidence in the record to show that Employee engaged in conduct which constituted a crime. Accordingly, this Board finds that the AJ properly addressed this issue, and we agree with his determination that Charge No. 1, Specification No. 1 is supported by the evidence.

Assuming arguendo that there is insufficient proof in the record to demonstrate that Employee violated Title 21-843, the record is replete with evidence to support Charge No. 1,

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[13] Metropolitan Police Department Internal Affairs Bureau, Final Investigative Report Concerning Allegations of Misconduct by Sergeant Michael Skelly Patrol Services and School Security Bureau—Fifth District, IS #11-002950 (August 19, 2014).
[14] *Agency Answer to Petition for Appeal*, Adverse Action Panel's Findings of Fact and Conclusions of Law, Tab 1 (November 9, 2015).
[15] *Id.* As a part of Agency's investigation, Employee's personnel file revealed that he was never a member of an Explosive Ordinance Unit.

Specification No. 2. Employee claims that he never altered a prescription for Percocet that was written by Dr. Lastrapes by placing the number "1" in the refill area on the prescription (RX 103340). He maintains that Agent Ikner provided false testimony in this regard and that he attempted to influence Dr. Lastrapes' statement by suggesting what may have happened to the altered prescription. Yet, during his first and second investigative interviews, Dr. Lastrapes provided consistent accounts of the incident concerning RX 103340, stating that he did not place a "1" in the refill section for the Percocet prescription because a refill cannot be requested for that type of drug.[16] The Trial Panel agreed with Dr. Lastrapes and concluded that Employee knowingly falsified a prescription for a controlled substance. Conversely, the Panel found Employee's version of events to be untruthful. The Trial Panel was the finder of fact in this case, and the Board will not second guess its credibility determinations. As a result, we find that the AJ did not err in finding that there is substantial evidence in the record to sustain Charge No. 1, Specification No. 2.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-16

Charge No. 2, Specification No. 1 was based on Employee's failure to obey orders and directives issued by the Chief of Police. Agency explains that Employee violated its Drug Free Work Place Directive, which addresses the regulation of drug use in the workplace. Employee argues that this specification does not allege that Employee engaged in any specific conduct which violated the directive because it does not prohibit the use of controlled substances in the workplace. Thus, Employee opines that even if he was taking excessive prescription medications while on duty, his actions did not violate the District's drug use policy. Under the policy,

[16] During his November 11, 2011 interview with Agent Ikner, Dr. Lastrapes was shown a prescription that Employee attempted to fill at a Rite Aid Pharmacy containing his signature. When asked if Dr. Lastrapes placed the number "1" on the refill line, he replied "[w]ith certainty, I did not write it. There are no refills on Schedule II drugs. You have to get an original every time."

employees of the District of Columbia government are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the work place.[17] The directive states the following in pertinent part:

> II. Drug Free Workplace Awareness Program
>
> > The use and/or position of illicit drugs by District Employees in the workplace impairs the government's ability to carry out its mission, and poses substantial dangers to employee, clients and the public.
> >
> > Those who use and/or possess drugs put themselves and those around them in danger of arrest and conviction for drug-related crimes.
> >
> > The District values its employees, and urges all individuals with substance abuse problems to seek counseling and rehabilitation.

Here, it is undisputed that Employee used controlled substances for numerous, legitimate injuries that he sustained over the years while on duty.[18] During the administrative hearing, Employee admitted that he was only supposed to take three pills a day. Instead, Employee ingested up to ten pills a day because he became resistant to the effects of the medication.[19] This Board disagrees with Employee's position and finds that there is substantial evidence in the record to uphold the AJ's determination that Employee violated the Drug Free Work Place Awareness Program. Employee obtained controlled narcotics by inappropriate pretenses and failed to notify Agency that he was using excessive amounts of the medications.[20] Under the

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[17] *Agency Answer to Petition for Appeal*, Tab 1.

[18] The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986. The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

[19] *Trial Panel Finding Number* 64.

[20] The Board must note that Title 21, Section 801(a)(1) of the United States Controlled Substance Act recognizes that many controlled drugs have a "useful and legitimate medical purpose and are necessary to maintain the health

program, employees who violate the directives are subject to disciplinary action. Accordingly, Charge No. 2, Specification No. 1 must be sustained.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-12 and General Order 201.26, Part 1-B-22.

Next, Employee was charged with "[c]onduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively...." In Specification No. 1, Agency alleges that Employee was willfully and knowingly untruthful to Dr. Lastrapes when he obtained a prescription for Percocet by fraudulent means when Employee stated that his private physician was out of town on March 17, 2011. Employee counters Agency's assertion and argues that he never requested a prescription from Dr. Lastrapes and that the doctor decided on his own initiative to write him a prescription for Percocet.

The Trial Panel dismissed Employee's argument, stating that "[Employee] was untruthful when he advised PFC Physician Lastrapes that his personal physician was out of town which resulted in Dr. Lastrapes prescribing [Employee] Percocet."[21] While Employee questions the veracity of Agent Ikner's recitation of events during the investigation, the AJ was reasonable in concluding that Agency met its burden of proof with respect to this specification. The Panel was permitted to rely upon hearsay evidence as a basis for reaching its conclusion and there is no clear error on the part of the AJ. For this reason, we find Employee's argument to be unpersuasive.

Concerning Specification No. 2, Agency purports that Employee was "less than truthful

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and general welfare of the American people." The District's drug use directive does not specifically address its policy with respect to employees who have lawfully obtained a controlled substance from a medical healthcare provider for legitimate reasons. Clarification and specification regarding such would be useful in providing guidance to this Office for adjudication purposes.

[21] *Panel Findings of Fact.*

to several Police and Fire Clinic physicians about the narcotic medications [Employee was] taking and the injuries for which [he] [received] treatment." Even when construed in a light most favorable to Agency, this allegation lacks specificity and is ambiguous, at best. Agency provides no legal standard for assessing misconduct as it relates to Employee being less than truthful. Nor, does it offer any credible facts to support it position that Employee's statements to Dr. Lastrapes violated General Order 201.26. This is not to say that Employee's act of obtaining an excessive amount of controlled narcotics was proper. However, Agency fails to identify which PFC physicians it was referring to in relation to this specification. It further fails to pinpoint the dates on which Employee proffered "less than truthful" information to PFC physicians. For this reason, this Board cannot soundly conclude that Charge No. 3, Specification No. 2 was based on substantial evidence.

Charge No. 4: Violation of General Order 120.21, Table of Offenses & Penalties, Part A.

Lastly, Agency charged Employee with "any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force...." Agency based its charge on Employee's act of obtaining narcotics from different providers after being advised by Dr. John Feiley and Dr. Z. Chris that Aetna insurance notified them, in writing, that Employee was receiving prescriptions from several providers. It is Agency's contention that Employee knew that this behavior was not proper. Conversely, Employee disputes this allegation and states that Agency's specification is defective because it fails to state facts which constitute actual misconduct. This Board disagrees and finds that Charge No. 4, Specification No. 1, is based on substantial evidence.

During his investigation with Agent Ikner, Dr. Feeley acknowledged receiving notices from Employee's medical insurance provider, Aetna, in February and August of 2011. Aetna

advised Dr. Feeley that Employee was "red flagged" because he was seeking prescriptions for narcotics from multiple providers. Yet, he stated that he continued to prescribe medications to Employee. Dr. Feeley further stated that he did not think anything was wrong with prescribing a narcotic to Employee for his back pain in spite of Aetna's "red flag" notification.[22] Similarly, Dr. Z. Chris acknowledged receiving notice from Aetna in 2011 stating that Employee was seeing multiple doctors for pain medication. Dr. Z. Chris subsequently called Employee to inform him about the notice and told him that the DEA probably received the same warning letter.

The conduct of Employee's medical providers is not at issue in this case, as they exercised their professional judgment in prescribing Employee medications after being warned by Aetna that Employee had received hundreds of controlled narcotics over the years. However, Employee made misrepresentations to these providers and failed to disclose that he had access to the same prescriptions for identical ailments even after being warned that his activities were problematic. Of most concern, Employee was under the influence of a large amount of controlled substances while on full duty and failed to notify Agency of his status. This misconduct is prejudicial to the good order of the police force because Employee exercised a continuous and deliberate ploy to obtain narcotics, which, if used in excess or improperly, placed both Employee and the public at risk of danger. Therefore, this Board finds that the AJ did not err in upholding Charge No. 4, Specification No. 1.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision was based on substantial evidence in the record, notwithstanding the existence of contradicting evidence to support an alternate conclusion. The AJ properly addressed each charge and specification against Employee. Notwithstanding Charge No. 3, Specification No. 2, the AJ's conclusions of law flowed

[22] *Agency Answer to Petition for Appeal*, Tab 1, Attachment #16.

rationally from the evidence presented. Thus, we can find no credible basis for disturbing the AJ's conclusion that Employee's termination was proper. Consequently, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

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

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Elaine 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:

Michael Skelly
2757 S. Glebe Road
#303
Arlington, VA 22206

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Office of the Attorney General
For the District of Columbia
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Washington, DC 20001

Katrina Hill
Clerk

March 22, 2018
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL SKELLY **140 Spring Court** **Falls Church, Virginia 22046**	*	
Petitioner,	*	
v.	*	**Civil Action No.**
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS **1100 4th Street, S.W.** **Suite 620 East** **Washington, D.C. 20024**	*	
Respondent.	*	

PETITION FOR REVIEW OF AGENCY DECISION

JURISDICTION

This Court has jurisdiction pursuant to D.C. Code § 1-606.03 and Superior Court Agency Review Rule 1.

A. Notice is hereby given that Michael Skelly appeals to the Superior Court of the District of Columbia from the Opinion and Order issued by the Office of Employee Appeals ("OEA") on March 22, 2018. A copy of the OEA Opinion and Order is attached to this Petition.

B. Address of Respondent Agency or Official: Office of Employee Appeals, 1100 4th Street, S.W., Suite 620 East, Washington, D.C. 20024.

C. Names and address of all other parties to the Agency proceeding: District of Columbia Government, Metropolitan Police Department, 300 Indiana Avenue, N.W., Washington, D.C. 20001.

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

Lasheka Brown Bassey, Esquire
General Counsel
D.C. Office of Employee Appeals
1100 4th Street, S.W.
Suite 620 East
Washington, D.C. 20024

Frank M. McDougald, Esquire
Assistant Attorney General
Office of the Attorney General
441 4th Street, N.W.
Suite 1180 North
Washington, D.C. 20001
Counsel for MPD before OEA

E. A copy of the March 22, 2018 Office of Employee Appeals decision or order sought to be reviewed is attached to this Petition.

F. Petitioner seeks reversal of the Office of Employee Appeals ("OEA") decision and of the underlying termination action of the Metropolitan Police Department. Petitioner, an MPD Sergeant, was terminated by MPD for misconduct based on his taking of prescription medications over a 22 year period. Petitioner appealed to OEA, which denied his appeal essentially on the grounds that there was substantial evidence in the record to support the MPD action. Petitioner contends that OEA committed reversible error because MPD's action is clearly erroneous as a matter of law in several respects, as well as not being supported by substantial, reliable, probative evidence of record.

DESO & BUCKLEY, P.C.

By: /s/ Robert E. Deso
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Attorney for Petitioner

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL SKELLY,	)	OEA Matter No. 1601-0001-16
Employee	)	
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Skelly ("Employee") worked as a Sergeant with the Metropolitan Police Department ("Agency"). On October 15, 2014, Agency issued a Notice of Proposed Adverse Action, charging Employee with engaging in conduct constituting a crime; failure to obey orders and directives issued by the Chief of Police; conduct unbecoming of an officer; and prejudicial conduct. The charges stemmed from Employee's arrest for receiving and filling prescriptions for multiple narcotics from different medical providers. Agency also alleged that Employee altered a prescription for Percocet and that he was untruthful in his communications with doctors regarding the prescriptions that he was taking. Employee subsequently requested to have an Adverse Action Panel ("Trial Panel") review the charges and specifications against him. After

holding an evidentiary hearing, the Trial Panel recommended that Employee be terminated based on each of the four charges. On June 2, 2015, Agency issued its Final Notice of Adverse Action, sustaining the Panel's recommendation. Employee's termination became effective on September 4, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 2, 2015. In his appeal, Employee argued that his termination was improper and requested that he be reinstated with back pay and benefits.[1] Agency filed its Answer to the Petition for Appeal on November 9, 2015. It denied that Employee was wrongfully terminated and requested a hearing.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter in January of 2016. On April 4, 2016, the AJ held a prehearing conference to assess the parties' arguments. During the conference, the AJ determined that an evidentiary hearing was not warranted. The parties were then ordered to submit briefs addressing whether the Trial Panel's decision was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Agency's termination action was taken in accordance with all applicable laws, rules, and regulations.[3]

In his brief, Employee alleged that Agency failed to state a specific offense in support of its assertion that he violated U.S. Code Title 21-843 because there was no evidence to prove that he was involved in deception and/or fraud. Employee also contended that he did not commit a crime by altering a prescription for Percocet and that this charge was based upon unsubstantiated hearsay testimony. He further stated that he did not violate Agency's drug policy because the directive does not prohibit employees from possessing or taking lawfully prescribed medications

[1] *Petition for Appeal* (October 2, 2015).
[2] *Agency Answer to Petition for Appeal* (November 9, 2015).
[3] *Order on Briefs* (May 26, 2016).

at work. Moreover, Employee opined that the conduct unbecoming charge could not be supported because the accompanying specifications erroneously relied on the credibility of Dr. Lastrapes, a Police and Fire Chief Physician ("PFC"), who did not testify at the Trial Panel and did not provide an affidavit or written statement.

Next, Employee posited that he was denied due process regarding Agency's allegation that he was less than truthful to PFC physicians because he was unable to adequately defend against the charge provided in Agency's proposed notice. Lastly, Employee claimed that the prejudicial conduct charge could not be sustained because there was no rule or regulation which prohibited him from continuing to take medications prescribed by his treating physicians. Therefore, Employee requested that the Trial Panel's decision be reversed and that Agency's termination action be overturned.[4]

In response, Agency asserted that its conclusions regarding Employee's misconduct were supported by substantial evidence. It stated that the evidence reflected the excessive amounts of controlled narcotics that Employee was taking and the unlawful methods by which he was able to obtain prescriptions for the drugs. In addition, Agency provided that the Trial Panel had the opportunity to observe each witness's demeanor and assess their credibility, ultimately determining that Employee did not provide credible testimony. Agency claimed that the act of engaging in a scheme to obtain controlled substances from different providers was criminal behavior and violated U.S. Code Title 21-843. Further, it argued that Employee committed misconduct by providing untruthful information to PFC physicians about the medications he was taking and the illnesses for which he was receiving treatment. As a result, Agency requested that the AJ affirm its termination action.[5]

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[4] *Employee Brief* (June 10, 2016).
[5] *Agency Brief* (July 27, 2016). Employee filed a Reply Brief on August 23, 2016, stating that the facts recited by

An Initial Decision was issued on May 17, 2017. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), OEA was limited to making a decision solely on the record if certain conditions were met.[6] Having determined that each condition set forth in *Pinkard* was satisfied, the AJ stated that the issues to be decided before OEA were whether the Trial Panel's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's termination action was done in accordance with applicable laws, rules, or regulations.[7]

Next, the AJ provided that Agency was not prevented from levying administrative charges against Employee for the same criminal violations which were previously rejected by federal prosecutors in D.C. and Virginia because they were expunged. The AJ noted that criminal charges were different in scope and nature from administrative charges. Thus, the declination letter issued by the U.S. Attorney's Office did not require that the corresponding administrative personnel charges be withdrawn.

Next, the AJ concluded that there was substantial evidence in the record to support a

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Agency did not support the charges and specifications against him. Employee also reiterated his previous arguments and maintained that Agency's charges were based entirely on unsubstantiated, irrelevant, and unreliable hearsay. *Employee Reply Brief* (August 23, 2016).

[6] *Initial Decision* (April 6, 2013). Under *Pinkard*, the following conditions must be met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
> 2. The employee has been subjected 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 [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing;" and
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

[7] *Id.* at 2.

finding that Employee engaged in a scheme to obtain controlled substances, in violation of General Order ("GO") 120.21, Attachment A, Part A-7. He stated that under U.S. Code Title 21-843, Employee's behavior constituted misconduct that would be deemed a crime. Similarly, the AJ stated that Employee's alteration of a prescription for Percocet was an act which constituted a crime. Consequently, he held that Charge No. 1 properly alleged misconduct and should be sustained.

With respect to the failure to observe orders charge, the AJ determined that Employee violated Agency's Drug Free Work Place Directive, which prohibits the use of controlled substances in the workplace. According to the AJ, the record reflected that Employee was taking excessive amounts of controlled substances while on duty and failed to notify Agency. Thus, he sustained Charge No. 2.

Regarding the conduct unbecoming accusation, the AJ provided that Agency properly charged Employee with misconduct after he was untruthful to Dr. Lastrapes about his regular physician being out of town in an effort to obtain a prescription. Additionally, the AJ stated that Employee was untruthful to PFC physicians about the controlled substances he was taking and the injuries and illnesses for which he was receiving treatment.

Concerning the prejudicial conduct charge, the AJ concluded that Agency properly alleged misconduct for each specification. He noted that Employee displayed a continuing pattern of obtaining controlled substances from several providers, even after being told by his treating physicians that his actions were problematic. The AJ also dismissed Employee's argument that the record failed to prove that he was guilty of diversion under 21 U.S.C. § 843. He emphasized that a reading of the statute's plain meaning only required a showing that a controlled substance was acquired by fraudulent means, not that the substance be obtained by

fraud and sold illegally. Further, the AJ noted that the Trial Panel correctly admitted and relied upon hearsay evidence during the evidentiary hearing, as such evidence is routinely permissible in administrative hearings. He also stated that the premise of Agency's adverse action was not that Employee was unlawfully prescribed controlled substances. Rather, the case against Employee was based on his acquisition of prescriptions through a devised scheme to obtain excessive amounts of controlled substances. Accordingly, the AJ concluded that the conduct of the treating physicians in prescribing medications to Employee was not the issue before the Trial Panel.

After examining the record, the AJ held that Agency's case was not based solely on the impeachable hearsay of a single witness, Agent Ikner, who was responsible for conducting the investigation into Employee's alleged misconduct. He opined that Agency's case was supported and corroborated by Agency's other witnesses, as well as the documentary evidence obtained from judicial bodies in surrounding jurisdictions.

Finally, the AJ held that the Trial Panel provided a detailed summary of the relevant evidence in its Findings of Fact and Conclusions of Law. He stated that the Panel was well within its right to assess witness credibility. While the AJ was sympathetic to Employee's need for painkillers due to his injuries, he ultimately concluded that the Trial Panel's findings were supported by substantial evidence. Consequently, Employee's termination was upheld.[8]

Employee disagreed and filed Petition for Review with OEA's Board. He argues that the Initial Decision is based on an erroneous interpretation of statute; that the AJ's conclusions of law were not based on substantial evidence; and that the Initial Decision failed to address all issues of law and fact that were properly raised in the appeal. Specifically, Employee asserts that

[8] *Initial Decision* (May 17, 2017). Neither party alleged that Agency committed a harmful procedural error or that it failed to conduct its adverse action in accordance with all applicable laws, rules, or regulations. Therefore, the AJ did not address these issues in his decision.

the AJ failed to address the requisite elements of the offense for each of the specifications contained in the charges levied against him, including identifying what evidence is considered relevant to each specification. He further states that the Initial Decision lacks compliance with the requisite judicial analysis procedures established by the Supreme Court and the Merit Systems Protection Board ("MSPB") pertinent to burden of proof, reliance on hearsay evidence, and the need for expert witness testimony. According to Employee, Agency failed to meet its burden of proof in showing that he used an excessive amount of controlled medications over the years or that he fashioned a "scheme" to improperly obtain the drugs. Lastly, he disputes the AJ's findings with respect to each of the charges and corresponding specifications provided in Agency's Notice of Proposed Adverse Action. Therefore, Employee asks this Board to reverse the Initial Decision.[9]

Agency filed a Brief in Opposition to Employee's Petition for Review on July 21, 2017. It claims that the Initial Decision is based substantial evidence and details arguments regarding why each charge and specification is supported by the record. Agency also reiterates its position that Employee engaged in a scheme to obtain excessive amounts of controlled substances for personal use; thereby, violating federal statute and Agency's policy related to drugs in the workplace. As such, Agency asks this Board to uphold the Initial Decision and deny Employee's Petition for Review.[10]

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[9] *Petition for Review* (July 21, 2017).

[10] *Agency's Opposition to Employee's Petition for Review* (July 21, 2017). Employee subsequently filed a Reply Brief on August 14, 2017, in which he responds to Agency's arguments regarding its position on the validity of the AJ's findings. On September 6, 2017, Agency filed a Motion to Strike Employee's Reply Brief, arguing that Employee was not permitted to file a Reply Brief to Agency's oppositional brief. Employee then filed an Opposition to Agency's Motion to Strike on September 20, 2017.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7

Agency's first charge is based on Employee's violation of GO 120.21 for "[c]onviction of any member of the force in any court of competent jurisdiction...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...." According to Agency, Specification No. 1 alleges that Employee violated U.S. Code Title 21-843 by receiving prescriptions for multiple narcotics from different providers and refilling them at various locations. However, Employee argues that the facts do not allege an actual violation of U.S. Code Title 21-843 or any other crime or misconduct which can constitute a basis for discipline. As a result, Employee claims that the AJ committed a clear error of law. U.S. Code Title 21-843 states the following in pertinent part:

> Whosoever knowingly and willfully executes, or attempts to execute, a scheme or artifice:

[11] *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).

> (1) To defraud any healthcare benefit program; or
> (2) To obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery or payment for health care benefits, items, or services...

Here, there is substantial evidence in the record to uphold the AJ's findings with respect to this specification. Employee posits that Agency erroneously relied upon his arrest for "Obtaining Drug: Forgery or Altered Prescription" because the charge was accepted and dismissed by an Arlington County Magistrate after the U.S. Attorney for the District of Columbia declined to prosecute Employee following the conclusion of its investigation. However, the language of GO 120.21 does not require a conviction to sustain a charge for "...conduct which would constitute a crime, whether or not a court record reflects a conviction...." Rather, the underlying conduct must be examined to determine whether the employee's behavior was criminal in nature.[12]

Agency and the Drug Enforcement Agency ("DEA") Task Force conducted a joint investigation in collaboration with the Internal Affairs Department ("IAD") to hold several interviews with the multiple doctors who treated Employee. The evidence "led investigators to believe that probable cause...substantiated [the] allegation that [Employee] was obtaining prescriptions through false pretense, seeking medical care from multiple providers and being prescribed the same narcotic medications in addition to narcotics in excess of what was

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[12] *See Fullord-Cuthbertson v. Department of Corrections*, OEA Matter No. 1601-0018-13R16, *Opinion and Order on Petition for Review* (June 6, 2017). On Petition for Review, OEA's Board addressed whether an arrest is required to sustain a charge for "any act which constitutes a criminal offense whether or not the act results in a conviction" under D.C. Municipal Regulation §1603.3(h). The Board agreed with the AJ's reasoning that the purpose of the crafting the law was to ensure that an employee who commits a criminal act, such as fraud in the unlawful collection of unemployment insurance benefits, can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against them.

needed."[13] The joint investigation also alleged that Employee was exploiting his health care insurance in a fraudulent manner, and utilized diversion tactics to obtain prescriptions in D.C., Maryland, and Virginia.

While it is true that he was never criminally convicted, Employee admitted to the Trial Panel that he refilled prescriptions prior to exhausting his current medication allowance in order to increase the original amount that was prescribed. Employee even acknowledged that he manipulated the system in order to refill prescriptions.[14] Further, Employee was prescribed medication from a physician after falsely informing the doctor that he suffered from Post-Traumatic Stress Disorder as a result of being a member of Agency's bomb squad.[15] This conduct violates U.S. Code Title 21-843 because Employee utilized false pretenses to obtain controlled substances. It should be noted that this Board agrees with Employee's supposition that the act of filling multiple prescriptions at different locations was not a criminal activity *per se.* However, obtaining said medications through unscrupulous methods and devises for the purpose of obtaining excessive amounts of narcotics is prohibited by statute. While he disagrees with the Panel's finding, there remains a considerable amount of evidence in the record to show that Employee engaged in conduct which constituted a crime. Accordingly, this Board finds that the AJ properly addressed this issue, and we agree with his determination that Charge No. 1, Specification No. 1 is supported by the evidence.

Assuming arguendo that there is insufficient proof in the record to demonstrate that Employee violated Title 21-843, the record is replete with evidence to support Charge No. 1,

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[13] Metropolitan Police Department Internal Affairs Bureau, Final Investigative Report Concerning Allegations of Misconduct by Sergeant Michael Skelly Patrol Services and School Security Bureau—Fifth District, IS #11-002950 (August 19, 2014).

[14] *Agency Answer to Petition for Appeal*, Adverse Action Panel's Findings of Fact and Conclusions of Law, Tab 1 (November 9, 2015).

[15] *Id.* As a part of Agency's investigation, Employee's personnel file revealed that he was never a member of an Explosive Ordinance Unit.

Specification No. 2. Employee claims that he never altered a prescription for Percocet that was written by Dr. Lastrapes by placing the number "1" in the refill area on the prescription (RX 103340). He maintains that Agent Ikner provided false testimony in this regard and that he attempted to influence Dr. Lastrapes' statement by suggesting what may have happened to the altered prescription. Yet, during his first and second investigative interviews, Dr. Lastrapes provided consistent accounts of the incident concerning RX 103340, stating that he did not place a "1" in the refill section for the Percocet prescription because a refill cannot be requested for that type of drug.[16] The Trial Panel agreed with Dr. Lastrapes and concluded that Employee knowingly falsified a prescription for a controlled substance. Conversely, the Panel found Employee's version of events to be untruthful. The Trial Panel was the finder of fact in this case, and the Board will not second guess its credibility determinations. As a result, we find that the AJ did not err in finding that there is substantial evidence in the record to sustain Charge No. 1, Specification No. 2.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-16

Charge No. 2, Specification No. 1 was based on Employee's failure to obey orders and directives issued by the Chief of Police. Agency explains that Employee violated its Drug Free Work Place Directive, which addresses the regulation of drug use in the workplace. Employee argues that this specification does not allege that Employee engaged in any specific conduct which violated the directive because it does not prohibit the use of controlled substances in the workplace. Thus, Employee opines that even if he was taking excessive prescription medications while on duty, his actions did not violate the District's drug use policy. Under the policy,

[16] During his November 11, 2011 interview with Agent Ikner, Dr. Lastrapes was shown a prescription that Employee attempted to fill at a Rite Aid Pharmacy containing his signature. When asked if Dr. Lastrapes placed the number "1" on the refill line, he replied "[w]ith certainty, I did not write it. There are no refills on Schedule II drugs. You have to get an original every time."

employees of the District of Columbia government are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the work place.[17] The directive states the following in pertinent part:

> II. Drug Free Workplace Awareness Program
>
> > The use and/or position of illicit drugs by District Employees in the workplace impairs the government's ability to carry out its mission, and poses substantial dangers to employee, clients and the public.
> >
> > Those who use and/or possess drugs put themselves and those around them in danger of arrest and conviction for drug-related crimes.
> >
> > The District values its employees, and urges all individuals with substance abuse problems to seek counseling and rehabilitation.

Here, it is undisputed that Employee used controlled substances for numerous, legitimate injuries that he sustained over the years while on duty.[18] During the administrative hearing, Employee admitted that he was only supposed to take three pills a day. Instead, Employee ingested up to ten pills a day because he became resistant to the effects of the medication.[19] This Board disagrees with Employee's position and finds that there is substantial evidence in the record to uphold the AJ's determination that Employee violated the Drug Free Work Place Awareness Program. Employee obtained controlled narcotics by inappropriate pretenses and failed to notify Agency that he was using excessive amounts of the medications.[20] Under the

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[17] *Agency Answer to Petition for Appeal*, Tab 1.

[18] The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986. The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

[19] *Trial Panel Finding Number* 64.

[20] The Board must note that Title 21, Section 801(a)(1) of the United States Controlled Substance Act recognizes that many controlled drugs have a "useful and legitimate medical purpose and are necessary to maintain the health

program, employees who violate the directives are subject to disciplinary action. Accordingly, Charge No. 2, Specification No. 1 must be sustained.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-12 and General Order 201.26, Part 1-B-22.

Next, Employee was charged with "[c]onduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively...." In Specification No. 1, Agency alleges that Employee was willfully and knowingly untruthful to Dr. Lastrapes when he obtained a prescription for Percocet by fraudulent means when Employee stated that his private physician was out of town on March 17, 2011. Employee counters Agency's assertion and argues that he never requested a prescription from Dr. Lastrapes and that the doctor decided on his own initiative to write him a prescription for Percocet.

The Trial Panel dismissed Employee's argument, stating that "[Employee] was untruthful when he advised PFC Physician Lastrapes that his personal physician was out of town which resulted in Dr. Lastrapes prescribing [Employee] Percocet."[21] While Employee questions the veracity of Agent Ikner's recitation of events during the investigation, the AJ was reasonable in concluding that Agency met its burden of proof with respect to this specification. The Panel was permitted to rely upon hearsay evidence as a basis for reaching its conclusion and there is no clear error on the part of the AJ. For this reason, we find Employee's argument to be unpersuasive.

Concerning Specification No. 2, Agency purports that Employee was "less than truthful

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and general welfare of the American people." The District's drug use directive does not specifically address its policy with respect to employees who have lawfully obtained a controlled substance from a medical healthcare provider for legitimate reasons. Clarification and specification regarding such would be useful in providing guidance to this Office for adjudication purposes.

[21] *Panel Findings of Fact.*

to several Police and Fire Clinic physicians about the narcotic medications [Employee was] taking and the injuries for which [he] [received] treatment." Even when construed in a light most favorable to Agency, this allegation lacks specificity and is ambiguous, at best. Agency provides no legal standard for assessing misconduct as it relates to Employee being less than truthful. Nor, does it offer any credible facts to support it position that Employee's statements to Dr. Lastrapes violated General Order 201.26. This is not to say that Employee's act of obtaining an excessive amount of controlled narcotics was proper. However, Agency fails to identify which PFC physicians it was referring to in relation to this specification. It further fails to pinpoint the dates on which Employee proffered "less than truthful" information to PFC physicians. For this reason, this Board cannot soundly conclude that Charge No. 3, Specification No. 2 was based on substantial evidence.

Charge No. 4: Violation of General Order 120.21, Table of Offenses & Penalties, Part A,

Lastly, Agency charged Employee with "any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force...." Agency based its charge on Employee's act of obtaining narcotics from different providers after being advised by Dr. John Felley and Dr. Z. Chris that Aetna insurance notified them, in writing, that Employee was receiving prescriptions from several providers. It is Agency's contention that Employee knew that this behavior was not proper. Conversely, Employee disputes this allegation and states that Agency's specification is defective because it fails to state facts which constitute actual misconduct. This Board disagrees and finds that Charge No. 4, Specification No. 1, is based on substantial evidence.

During his investigation with Agent Ikner, Dr. Feeley acknowledged receiving notices from Employee's medical insurance provider, Aetna, in February and August of 2011. Aetna

advised Dr. Feeley that Employee was "red flagged" because he was seeking prescriptions for narcotics from multiple providers. Yet, he stated that he continued to prescribe medications to Employee. Dr. Feeley further stated that he did not think anything was wrong with prescribing a narcotic to Employee for his back pain in spite of Aetna's "red flag" notification.[22] Similarly, Dr. Z. Chris acknowledged receiving notice from Aetna in 2011 stating that Employee was seeing multiple doctors for pain medication. Dr. Z. Chris subsequently called Employee to inform him about the notice and told him that the DEA probably received the same warning letter.

The conduct of Employee's medical providers is not at issue in this case, as they exercised their professional judgment in prescribing Employee medications after being warned by Aetna that Employee had received hundreds of controlled narcotics over the years. However, Employee made misrepresentations to these providers and failed to disclose that he had access to the same prescriptions for identical ailments even after being warned that his activities were problematic. Of most concern, Employee was under the influence of a large amount of controlled substances while on full duty and failed to notify Agency of his status. This misconduct is prejudicial to the good order of the police force because Employee exercised a continuous and deliberate ploy to obtain narcotics, which, if used in excess or improperly, placed both Employee and the public at risk of danger. Therefore, this Board finds that the AJ did not err in upholding Charge No. 4, Specification No. 1.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision was based on substantial evidence in the record, notwithstanding the existence of contradicting evidence to support an alternate conclusion. The AJ properly addressed each charge and specification against Employee. Notwithstanding Charge No. 3, Specification No. 2, the AJ's conclusions of law flowed

[22] *Agency Answer to Petition for Appeal*, Tab 1, Attachment #16.

rationally from the evidence presented. Thus, we can find no credible basis for disturbing the AJ's conclusion that Employee's termination was proper. Consequently, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

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

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Selani Freeman

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

CERTIFICATE OF SERVICE

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

Michael Skelly
2757 S. Glebe Road
#303
Arlington, VA 22206

Robert Deso, Esq.
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Suite 830
Washington, DC 20006

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Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
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

MICHAEL SKELLY, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 002463 P(MPA) Judge Neal E. Kravitz

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Michael Skelly v. Metropolitan Police Department,* OEA Matter No. 1601-0001-16. The record consists of two volumes containing twenty-six (26) 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 29th day of June, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

MICHAEL SKELLY, Petitioner	)	Case No. 2018 CA 002463 P(MPA)
v.	)	Judge Neal E. Kravitz
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	)	**Next Event: Status Hearing** **November 2, 2018 at 10:00 a.m.**

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on July 6, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Michael Skelly v. Metropolitan Police Department*, OEA Matter Number 1601-0001-16 (March 22, 2018) as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted

Lasheka Brown Bassey

Lasheka Brown Bassey
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2018, the forgoing Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Robert E. Deso

Andrea Comentale

Frank McDougald

Respectfully submitted,

Lasheka Brown Bassey

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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL SKELLY,	)	OEA Matter No. 1601-0001-16
Employee	)	
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Skelly ("Employee") worked as a Sergeant with the Metropolitan Police Department ("Agency"). On October 15, 2014, Agency issued a Notice of Proposed Adverse Action, charging Employee with engaging in conduct constituting a crime; failure to obey orders and directives issued by the Chief of Police; conduct unbecoming of an officer; and prejudicial conduct. The charges stemmed from Employee's arrest for receiving and filling prescriptions for multiple narcotics from different medical providers. Agency also alleged that Employee altered a prescription for Percocet and that he was untruthful in his communications with doctors regarding the prescriptions that he was taking. Employee subsequently requested to have an Adverse Action Panel ("Trial Panel") review the charges and specifications against him. After

holding an evidentiary hearing, the Trial Panel recommended that Employee be terminated based on each of the four charges. On June 2, 2015, Agency issued its Final Notice of Adverse Action, sustaining the Panel's recommendation. Employee's termination became effective on September 4, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 2, 2015. In his appeal, Employee argued that his termination was improper and requested that he be reinstated with back pay and benefits.[1] Agency filed its Answer to the Petition for Appeal on November 9, 2015. It denied that Employee was wrongfully terminated and requested a hearing.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter in January of 2016. On April 4, 2016, the AJ held a prehearing conference to assess the parties' arguments. During the conference, the AJ determined that an evidentiary hearing was not warranted. The parties were then ordered to submit briefs addressing whether the Trial Panel's decision was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Agency's termination action was taken in accordance with all applicable laws, rules, and regulations.[3]

In his brief, Employee alleged that Agency failed to state a specific offense in support of its assertion that he violated U.S. Code Title 21-843 because there was no evidence to prove that he was involved in deception and/or fraud. Employee also contended that he did not commit a crime by altering a prescription for Percocet and that this charge was based upon unsubstantiated hearsay testimony. He further stated that he did not violate Agency's drug policy because the directive does not prohibit employees from possessing or taking lawfully prescribed medications

[1] *Petition for Appeal* (October 2, 2015).
[2] *Agency Answer to Petition for Appeal* (November 9, 2015).
[3] *Order on Briefs* (May 26, 2016).

at work. Moreover, Employee opined that the conduct unbecoming charge could not be supported because the accompanying specifications erroneously relied on the credibility of Dr. Lastrapes, a Police and Fire Chief Physician ("PFC"), who did not testify at the Trial Panel and did not provide an affidavit or written statement.

Next, Employee posited that he was denied due process regarding Agency's allegation that he was less than truthful to PFC physicians because he was unable to adequately defend against the charge provided in Agency's proposed notice. Lastly, Employee claimed that the prejudicial conduct charge could not be sustained because there was no rule or regulation which prohibited him from continuing to take medications prescribed by his treating physicians. Therefore, Employee requested that the Trial Panel's decision be reversed and that Agency's termination action be overturned.[4]

In response, Agency asserted that its conclusions regarding Employee's misconduct were supported by substantial evidence. It stated that the evidence reflected the excessive amounts of controlled narcotics that Employee was taking and the unlawful methods by which he was able to obtain prescriptions for the drugs. In addition, Agency provided that the Trial Panel had the opportunity to observe each witness's demeanor and assess their credibility, ultimately determining that Employee did not provide credible testimony. Agency claimed that the act of engaging in a scheme to obtain controlled substances from different providers was criminal behavior and violated U.S. Code Title 21-843. Further, it argued that Employee committed misconduct by providing untruthful information to PFC physicians about the medications he was taking and the illnesses for which he was receiving treatment. As a result, Agency requested that the AJ affirm its termination action.[5]

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[4] *Employee Brief* (June 10, 2016).
[5] *Agency Brief* (July 27, 2016). Employee filed a Reply Brief on August 23, 2016, stating that the facts recited by

An Initial Decision was issued on May 17, 2017. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), OEA was limited to making a decision solely on the record if certain conditions were met.[6] Having determined that each condition set forth in *Pinkard* was satisfied, the AJ stated that the issues to be decided before OEA were whether the Trial Panel's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's termination action was done in accordance with applicable laws, rules, or regulations.[7]

Next, the AJ provided that Agency was not prevented from levying administrative charges against Employee for the same criminal violations which were previously rejected by federal prosecutors in D.C. and Virginia because they were expunged. The AJ noted that criminal charges were different in scope and nature from administrative charges. Thus, the declination letter issued by the U.S. Attorney's Office did not require that the corresponding administrative personnel charges be withdrawn.

Next, the AJ concluded that there was substantial evidence in the record to support a

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Agency did not support the charges and specifications against him. Employee also reiterated his previous arguments and maintained that Agency's charges were based entirely on unsubstantiated, irrelevant, and unreliable hearsay. *Employee Reply Brief* (August 23, 2016).

[6] *Initial Decision* (April 6, 2013). Under *Pinkard*, the following conditions must be met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
> 2. The employee has been subjected 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 [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing;" and
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

[7] *Id.* at 2.

finding that Employee engaged in a scheme to obtain controlled substances, in violation of General Order ("GO") 120.21, Attachment A, Part A-7. He stated that under U.S. Code Title 21-843, Employee's behavior constituted misconduct that would be deemed a crime. Similarly, the AJ stated that Employee's alteration of a prescription for Percocet was an act which constituted a crime. Consequently, he held that Charge No. 1 properly alleged misconduct and should be sustained.

With respect to the failure to observe orders charge, the AJ determined that Employee violated Agency's Drug Free Work Place Directive, which prohibits the use of controlled substances in the workplace. According to the AJ, the record reflected that Employee was taking excessive amounts of controlled substances while on duty and failed to notify Agency. Thus, he sustained Charge No. 2.

Regarding the conduct unbecoming accusation, the AJ provided that Agency properly charged Employee with misconduct after he was untruthful to Dr. Lastrapes about his regular physician being out of town in an effort to obtain a prescription. Additionally, the AJ stated that Employee was untruthful to PFC physicians about the controlled substances he was taking and the injuries and illnesses for which he was receiving treatment.

Concerning the prejudicial conduct charge, the AJ concluded that Agency properly alleged misconduct for each specification. He noted that Employee displayed a continuing pattern of obtaining controlled substances from several providers, even after being told by his treating physicians that his actions were problematic. The AJ also dismissed Employee's argument that the record failed to prove that he was guilty of diversion under 21 U.S.C. § 843. He emphasized that a reading of the statute's plain meaning only required a showing that a controlled substance was acquired by fraudulent means, not that the substance be obtained by

fraud and sold illegally. Further, the AJ noted that the Trial Panel correctly admitted and relied upon hearsay evidence during the evidentiary hearing, as such evidence is routinely permissible in administrative hearings. He also stated that the premise of Agency's adverse action was not that Employee was unlawfully prescribed controlled substances. Rather, the case against Employee was based on his acquisition of prescriptions through a devised scheme to obtain excessive amounts of controlled substances. Accordingly, the AJ concluded that the conduct of the treating physicians in prescribing medications to Employee was not the issue before the Trial Panel.

After examining the record, the AJ held that Agency's case was not based solely on the impeachable hearsay of a single witness, Agent Ikner, who was responsible for conducting the investigation into Employee's alleged misconduct. He opined that Agency's case was supported and corroborated by Agency's other witnesses, as well as the documentary evidence obtained from judicial bodies in surrounding jurisdictions.

Finally, the AJ held that the Trial Panel provided a detailed summary of the relevant evidence in its Findings of Fact and Conclusions of Law. He stated that the Panel was well within its right to assess witness credibility. While the AJ was sympathetic to Employee's need for painkillers due to his injuries, he ultimately concluded that the Trial Panel's findings were supported by substantial evidence. Consequently, Employee's termination was upheld.[8]

Employee disagreed and filed Petition for Review with OEA's Board. He argues that the Initial Decision is based on an erroneous interpretation of statute; that the AJ's conclusions of law were not based on substantial evidence; and that the Initial Decision failed to address all issues of law and fact that were properly raised in the appeal. Specifically, Employee asserts that

[8] *Initial Decision* (May 17, 2017). Neither party alleged that Agency committed a harmful procedural error or that it failed to conduct its adverse action in accordance with all applicable laws, rules, or regulations. Therefore, the AJ did not address these issues in his decision.

the AJ failed to address the requisite elements of the offense for each of the specifications contained in the charges levied against him, including identifying what evidence is considered relevant to each specification. He further states that the Initial Decision lacks compliance with the requisite judicial analysis procedures established by the Supreme Court and the Merit Systems Protection Board ("MSPB") pertinent to burden of proof, reliance on hearsay evidence, and the need for expert witness testimony. According to Employee, Agency failed to meet its burden of proof in showing that he used an excessive amount of controlled medications over the years or that he fashioned a "scheme" to improperly obtain the drugs. Lastly, he disputes the AJ's findings with respect to each of the charges and corresponding specifications provided in Agency's Notice of Proposed Adverse Action. Therefore, Employee asks this Board to reverse the Initial Decision.[9]

Agency filed a Brief in Opposition to Employee's Petition for Review on July 21, 2017. It claims that the Initial Decision is based substantial evidence and details arguments regarding why each charge and specification is supported by the record. Agency also reiterates its position that Employee engaged in a scheme to obtain excessive amounts of controlled substances for personal use; thereby, violating federal statute and Agency's policy related to drugs in the workplace. As such, Agency asks this Board to uphold the Initial Decision and deny Employee's Petition for Review.[10]

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[9] *Petition for Review* (July 21, 2017).

[10] *Agency's Opposition to Employee's Petition for Review* (July 21, 2017). Employee subsequently filed a Reply Brief on August 14, 2017, in which he responds to Agency's arguments regarding its position on the validity of the AJ's findings. On September 6, 2017, Agency filed a Motion to Strike Employee's Reply Brief, arguing that Employee was not permitted to file a Reply Brief to Agency's oppositional brief. Employee then filed an Opposition to Agency's Motion to Strike on September 20, 2017.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7

Agency's first charge is based on Employee's violation of GO 120.21 for "[c]onviction of any member of the force in any court of competent jurisdiction...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...." According to Agency, Specification No. 1 alleges that Employee violated U.S. Code Title 21-843 by receiving prescriptions for multiple narcotics from different providers and refilling them at various locations. However, Employee argues that the facts do not allege an actual violation of U.S. Code Title 21-843 or any other crime or misconduct which can constitute a basis for discipline. As a result, Employee claims that the AJ committed a clear error of law. U.S. Code Title 21-843 states the following in pertinent part:

> Whosoever knowingly and willfully executes, or attempts to execute, a scheme or artifice:

[11] *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).

> (1) To defraud any healthcare benefit program; or
> (2) To obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery or payment for health care benefits, items, or services...

Here, there is substantial evidence in the record to uphold the AJ's findings with respect to this specification. Employee posits that Agency erroneously relied upon his arrest for "Obtaining Drug: Forgery or Altered Prescription" because the charge was accepted and dismissed by an Arlington County Magistrate after the U.S. Attorney for the District of Columbia declined to prosecute Employee following the conclusion of its investigation. However, the language of GO 120.21 does not require a conviction to sustain a charge for "...conduct which would constitute a crime, whether or not a court record reflects a conviction...." Rather, the underlying conduct must be examined to determine whether the employee's behavior was criminal in nature.[12]

Agency and the Drug Enforcement Agency ("DEA") Task Force conducted a joint investigation in collaboration with the Internal Affairs Department ("IAD") to hold several interviews with the multiple doctors who treated Employee. The evidence "led investigators to believe that probable cause...substantiated [the] allegation that [Employee] was obtaining prescriptions through false pretense, seeking medical care from multiple providers and being prescribed the same narcotic medications in addition to narcotics in excess of what was

[12] *See Fullord-Cuthbertson v. Department of Corrections*, OEA Matter No. 1601-0018-13R16, *Opinion and Order on Petition for Review* (June 6, 2017). On Petition for Review, OEA's Board addressed whether an arrest is required to sustain a charge for "any act which constitutes a criminal offense whether or not the act results in a conviction" under D.C. Municipal Regulation §1603.3(h). The Board agreed with the AJ's reasoning that the purpose of the crafting the law was to ensure that an employee who commits a criminal act, such as fraud in the unlawful collection of unemployment insurance benefits, can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against them.

needed."[13] The joint investigation also alleged that Employee was exploiting his health care insurance in a fraudulent manner, and utilized diversion tactics to obtain prescriptions in D.C., Maryland, and Virginia.

While it is true that he was never criminally convicted, Employee admitted to the Trial Panel that he refilled prescriptions prior to exhausting his current medication allowance in order to increase the original amount that was prescribed. Employee even acknowledged that he manipulated the system in order to refill prescriptions.[14] Further, Employee was prescribed medication from a physician after falsely informing the doctor that he suffered from Post-Traumatic Stress Disorder as a result of being a member of Agency's bomb squad.[15] This conduct violates U.S. Code Title 21-843 because Employee utilized false pretenses to obtain controlled substances. It should be noted that this Board agrees with Employee's supposition that the act of filling multiple prescriptions at different locations was not a criminal activity *per se.* However, obtaining said medications through unscrupulous methods and devises for the purpose of obtaining excessive amounts of narcotics is prohibited by statute. While he disagrees with the Panel's finding, there remains a considerable amount of evidence in the record to show that Employee engaged in conduct which constituted a crime. Accordingly, this Board finds that the AJ properly addressed this issue, and we agree with his determination that Charge No. 1, Specification No. 1 is supported by the evidence.

Assuming arguendo that there is insufficient proof in the record to demonstrate that Employee violated Title 21-843, the record is replete with evidence to support Charge No. 1,

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[13] Metropolitan Police Department Internal Affairs Bureau, Final Investigative Report Concerning Allegations of Misconduct by Sergeant Michael Skelly Patrol Services and School Security Bureau—Fifth District, IS #11-002950 (August 19, 2014).
[14] *Agency Answer to Petition for Appeal*, Adverse Action Panel's Findings of Fact and Conclusions of Law, Tab 1 (November 9, 2015).
[15] *Id.* As a part of Agency's investigation, Employee's personnel file revealed that he was never a member of an Explosive Ordinance Unit.

Specification No. 2. Employee claims that he never altered a prescription for Percocet that was written by Dr. Lastrapes by placing the number "1" in the refill area on the prescription (RX 103340). He maintains that Agent Ikner provided false testimony in this regard and that he attempted to influence Dr. Lastrapes' statement by suggesting what may have happened to the altered prescription. Yet, during his first and second investigative interviews, Dr. Lastrapes provided consistent accounts of the incident concerning RX 103340, stating that he did not place a "1" in the refill section for the Percocet prescription because a refill cannot be requested for that type of drug.[16] The Trial Panel agreed with Dr. Lastrapes and concluded that Employee knowingly falsified a prescription for a controlled substance. Conversely, the Panel found Employee's version of events to be untruthful. The Trial Panel was the finder of fact in this case, and the Board will not second guess its credibility determinations. As a result, we find that the AJ did not err in finding that there is substantial evidence in the record to sustain Charge No. 1, Specification No. 2.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-16

Charge No. 2, Specification No. 1 was based on Employee's failure to obey orders and directives issued by the Chief of Police. Agency explains that Employee violated its Drug Free Work Place Directive, which addresses the regulation of drug use in the workplace. Employee argues that this specification does not allege that Employee engaged in any specific conduct which violated the directive because it does not prohibit the use of controlled substances in the workplace. Thus, Employee opines that even if he was taking excessive prescription medications while on duty, his actions did not violate the District's drug use policy. Under the policy,

[16] During his November 11, 2011 interview with Agent Ikner, Dr. Lastrapes was shown a prescription that Employee attempted to fill at a Rite Aid Pharmacy containing his signature. When asked if Dr. Lastrapes placed the number "1" on the refill line, he replied "[w]ith certainty, I did not write it. There are no refills on Schedule II drugs. You have to get an original every time."

employees of the District of Columbia government are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the work place.[17] The directive states the following in pertinent part:

> II. Drug Free Workplace Awareness Program
>
> > The use and/or position of illicit drugs by District Employees in the workplace impairs the government's ability to carry out its mission, and poses substantial dangers to employee, clients and the public.
> >
> > Those who use and/or possess drugs put themselves and those around them in danger of arrest and conviction for drug-related crimes.
> >
> > The District values its employees, and urges all individuals with substance abuse problems to seek counseling and rehabilitation.

Here, it is undisputed that Employee used controlled substances for numerous, legitimate injuries that he sustained over the years while on duty.[18] During the administrative hearing, Employee admitted that he was only supposed to take three pills a day. Instead, Employee ingested up to ten pills a day because he became resistant to the effects of the medication.[19] This Board disagrees with Employee's position and finds that there is substantial evidence in the record to uphold the AJ's determination that Employee violated the Drug Free Work Place Awareness Program. Employee obtained controlled narcotics by inappropriate pretenses and failed to notify Agency that he was using excessive amounts of the medications.[20] Under the

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[17] *Agency Answer to Petition for Appeal*, Tab 1.

[18] The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986. The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

[19] *Trial Panel Finding Number* 64.

[20] The Board must note that Title 21, Section 801(a)(1) of the United States Controlled Substance Act recognizes that many controlled drugs have a "useful and legitimate medical purpose and are necessary to maintain the health

program, employees who violate the directives are subject to disciplinary action. Accordingly, Charge No. 2, Specification No. 1 must be sustained.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-12 and General Order 201.26, Part 1-B-22.

Next, Employee was charged with "[c]onduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively...." In Specification No. 1, Agency alleges that Employee was willfully and knowingly untruthful to Dr. Lastrapes when he obtained a prescription for Percocet by fraudulent means when Employee stated that his private physician was out of town on March 17, 2011. Employee counters Agency's assertion and argues that he never requested a prescription from Dr. Lastrapes and that the doctor decided on his own initiative to write him a prescription for Percocet.

The Trial Panel dismissed Employee's argument, stating that "[Employee] was untruthful when he advised PFC Physician Lastrapes that his personal physician was out of town which resulted in Dr. Lastrapes prescribing [Employee] Percocet."[21] While Employee questions the veracity of Agent Ikner's recitation of events during the investigation, the AJ was reasonable in concluding that Agency met its burden of proof with respect to this specification. The Panel was permitted to rely upon hearsay evidence as a basis for reaching its conclusion and there is no clear error on the part of the AJ. For this reason, we find Employee's argument to be unpersuasive.

Concerning Specification No. 2, Agency purports that Employee was "less than truthful

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and general welfare of the American people." The District's drug use directive does not specifically address its policy with respect to employees who have lawfully obtained a controlled substance from a medical healthcare provider for legitimate reasons. Clarification and specification regarding such would be useful in providing guidance to this Office for adjudication purposes.

[21] *Panel Findings of Fact.*

to several Police and Fire Clinic physicians about the narcotic medications [Employee was] taking and the injuries for which [he] [received] treatment." Even when construed in a light most favorable to Agency, this allegation lacks specificity and is ambiguous, at best. Agency provides no legal standard for assessing misconduct as it relates to Employee being less than truthful. Nor, does it offer any credible facts to support it position that Employee's statements to Dr. Lastrapes violated General Order 201.26. This is not to say that Employee's act of obtaining an excessive amount of controlled narcotics was proper. However, Agency fails to identify which PFC physicians it was referring to in relation to this specification. It further fails to pinpoint the dates on which Employee proffered "less than truthful" information to PFC physicians. For this reason, this Board cannot soundly conclude that Charge No. 3, Specification No. 2 was based on substantial evidence.

Charge No. 4: Violation of General Order 120.21, Table of Offenses & Penalties, Part A.

Lastly, Agency charged Employee with "any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force...." Agency based its charge on Employee's act of obtaining narcotics from different providers after being advised by Dr. John Felley and Dr. Z. Chris that Aetna insurance notified them, in writing, that Employee was receiving prescriptions from several providers. It is Agency's contention that Employee knew that this behavior was not proper. Conversely, Employee disputes this allegation and states that Agency's specification is defective because it fails to state facts which constitute actual misconduct. This Board disagrees and finds that Charge No. 4, Specification No. 1, is based on substantial evidence.

During his investigation with Agent Ikner, Dr. Feeley acknowledged receiving notices from Employee's medical insurance provider, Aetna, in February and August of 2011. Aetna

advised Dr. Feeley that Employee was "red flagged" because he was seeking prescriptions for narcotics from multiple providers. Yet, he stated that he continued to prescribe medications to Employee. Dr. Feeley further stated that he did not think anything was wrong with prescribing a narcotic to Employee for his back pain in spite of Aetna's "red flag" notification.[22] Similarly, Dr. Z. Chris acknowledged receiving notice from Aetna in 2011 stating that Employee was seeing multiple doctors for pain medication. Dr. Z. Chris subsequently called Employee to inform him about the notice and told him that the DEA probably received the same warning letter.

The conduct of Employee's medical providers is not at issue in this case, as they exercised their professional judgment in prescribing Employee medications after being warned by Aetna that Employee had received hundreds of controlled narcotics over the years. However, Employee made misrepresentations to these providers and failed to disclose that he had access to the same prescriptions for identical ailments even after being warned that his activities were problematic. Of most concern, Employee was under the influence of a large amount of controlled substances while on full duty and failed to notify Agency of his status. This misconduct is prejudicial to the good order of the police force because Employee exercised a continuous and deliberate ploy to obtain narcotics, which, if used in excess or improperly, placed both Employee and the public at risk of danger. Therefore, this Board finds that the AJ did not err in upholding Charge No. 4, Specification No. 1.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision was based on substantial evidence in the record, notwithstanding the existence of contradicting evidence to support an alternate conclusion. The AJ properly addressed each charge and specification against Employee. Notwithstanding Charge No. 3, Specification No. 2, the AJ's conclusions of law flowed

[22] *Agency Answer to Petition for Appeal*, Tab 1, Attachment #16.

rationally from the evidence presented. Thus, we can find no credible basis for disturbing the AJ's conclusion that Employee's termination was proper. Consequently, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

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

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Clarence 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:

Michael Skelly
2757 S. Glebe Road
#303
Arlington, VA 22206

Robert Deso, Esq.
1776 K Street, NW
Suite 830
Washington, DC 20006

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

Katrina Hill
Clerk

March 22, 2018
Date

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Darryl Boone,
700 Fern Place, NW
Washington, D.C. 20012

Petitioner,

v.

DISTRICT OF COLUMBIA,
Office of Employee Appeals

Serve on: Sheila Barfield, Esq.
Executive Direct
Office of Employee Appeals
955 L'Enfant Plaza, SW Suite 2500
Washington, DC 20024
Respondent.

Civil Action No.: 2018 CA 006783 P(MPA)

Judge:

Dated: September 24, 2018

PETITION FOR REVIEW OF AGENCY DECISION ON REMAND

Notice is hereby given that Petitioner, Darryl Boone, appeals to the Superior Court of the District of Columbia the Initial Decision on Remand of Senior Administrative Judge (AJ) Joseph E. Lim of the District of Columbia Office of Employee Appeals (OEA), issued on August 21, 2018, when it was served by regular mail, and all rulings encompassed therein, in the matter of Darryl Boone v. D.C. Metropolitan Police Department, OEA Matter No. 2401-0019-12R18. Copies of the Administrative Judge's Initial Decision on Remand, as well as the Superior Court of the District of Columbia's Remand Order which remanded this matter to AJ Lim after he issued an Initial Decision which was upheld by OEA Board, are attached hereto as *Attachments 1 and 2* respectively.

A. Description of Decision and Order:

On August 21, 2018, AJ Lim issued an Initial Decision on Remand, upholding the District of Columbia Metropolitan Police Department's (MPD) 2011 removal of Petitioner through a Reduction in Force (RIF). Petitioner challenged his removal alleging that the RIF was not conducted in accordance with applicable rules, laws and regulations, specifically that MPD had failed to consider job sharing or reduced hours prior to conducting the RIF.[1] In his Decision on Remand, AJ Lim found that MPD did not consider job sharing or reduced hours, but upheld the RIF nonetheless. *Attachment 1*, at p. 4, 8.

Concise Statement of the Agency Proceedings and the Decisions as to Which Review is Sought and the Nature of the Relief Requested by Petitioner:

Petitioner, Mr. Darryl Boone, was an employee of MPD until he was removed from his position on October 14, 2011, as the result of a realignment and RIF. Petitioner timely filed a Petition for Appeal of his removal with OEA on November 10, 2011.

After Petitioner's case was assigned to AJ Lim, AJ Lim determined that the general RIF Statute, found in D.C. Code §1-624.02 and §1-624.04 applied to this RIF, not the Abolishment Act. D.C. Code §1-624.04 states an employee can appeal a RIF to the Office of Employee Appeals on the basis that, "he or she believes that his or her agency has incorrectly applied the provisions of this subchapter or the rules or regulations issued pursuant to this subchapter." *D.C. Code §1-624.04.*

Numerous briefs and filings were made throughout the Appeal process and an evidentiary hearing was held on July 7, 21015. Since the AJ determined that the broader RIF statute applied

[1] Numerous other arguments were raised during the appeal of this 2011 RIF, however, this is the only argument that was addressed in AJ Lim's August 21, 2018, Initial Decision on Remand.

to the RIF rather than the Abolishment Act, he was obligated to address any issues and arguments raised by Petitioner that Petitioner believed established that the Agency's RIF was not performed in accordance with applicable rules, laws and regulations.

On August 31, 2015, the AJ issued his Initial Decision and found that the Agency's RIF complied with all applicable rules, laws and regulations. Petitioner then filed a Petition for Review with OEA's Board on October 5, 2015 and on March 7, 2017, the Board issued its Opinion and Order on Petition for Review, denying the Petition for Review.

On April 7, 2017, Petitioner filed a Petition for Review with the Superior Court for the District of Columbia regarding the OEA's Decision upholding MPD's RIF of Petitioner. On April 6, 2018, Judge Todd E. Edelman issued an Order, granting the Petition for review and remanded the matter back to the OEA to determine whether or not the Agency considered job sharing and reduced hours, as required by D.C. Code 1-624.02(a). On August 21, 2018, AJ Lim issued an initial Decision on Remand, finding that the Agency failed to consider job sharing and reduced hours as required by D.C. Code 1-624.02(a), but upheld the RIF of Petitioner nonetheless.

Petitioner hereby files this Petition for Review regarding the AJ's Initial Decision on Remand in accordance with Superior Court Civil Procedure Rules, XV, Agency Review, Rule 1, asserting that the AJ's decision is contrary to law and not supported by substantial evidence. Therefore the AJ's Decisions should be reversed.

B. Address of Respondent, Agency or Official:

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

C. Names and Addresses of All Other Parties to the Agency's Proceedings:

District of Columbia Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

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

Sheila Bartfield, Esq.
Executive Director
Office of Employee Appeals
1100 Fourth Street, SW Suite 620 East
Washington, D.C. 20024

Peter Newsham
Chief of Police
District of Columbia Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

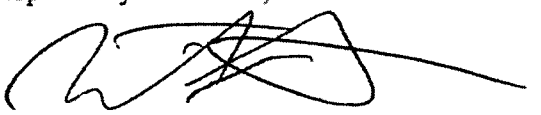
Karl Racine, Attorney General
c/o Andrea Comentale, Esq.
Section Chief—Personnel and Labor Relations
c/o Frank McDougald, Esq.
Assistant Attorney General
Personnel and Labor Relations Section
Office of the Attorney General
441 Fourth Street, NW
Room 1180N
Washington, D.C. 20001

E. Copy of The Agency's Decision or Order Sought to be Reviewed:

A copy of the Agency Decision and Order sought to be reviewed are attached to this Petition.

Dated: September 24, 2018

Respectfully submitted,



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Telephone: (703) 519-0300
Facsimile: (703) 519-0311
RShore@nage.org

Attorney for Petitioner

CERTIFICATE OF SERVICE

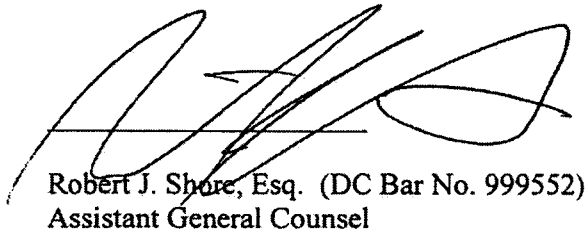
Although proof of service will be filed separately with the Court once this Petition is accepted, I hereby certify that a true and correct copy of the foregoing Petition for Review of Agency Decision will be served via certified mail, return receipt requested, on the following:

Sheila Barfield, Esq.
Executive Director
Office of Employee Appeals
955 L'Enfant Plaza, Suite 2500
Washington, DC 20024

Peter Newsham
Chief of Police
District of Columbia Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

Karl Racine, Attorney General
c/o Loren AliKham
Solicitor General
Office of the Attorney General for the District of Columbia
One Judiciary Square
441 Fourth Street, NW
Room 630 South
Washington, D.C. 20001

Date: September 24, 2018



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RShore@nage.org

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Samson Abeboye, Darryl Boone, Employees	OEA Matter No. 2401-0024-12R18 OEA Matter No. 2401-0019-12R18
v.	Date of Issuance: August 21, 2018
Metropolitan Police Department Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Frank McDougald, Esq., Agency Representative
Robert Shore, Esq., Employee Representative

INITIAL DECISION ON REMAND

INTRODUCTION

On November 10, 2011, Samson Abeboye and Darryl Boone ("Employees") filed separate Petitions for Appeal from the Metropolitan Police Department's ("MPD" or "Agency") final decision to separate them from government service pursuant to a Reduction-in-Force ("RIF"). This matter was assigned to me on July 26, 2013. After several continuances requested by the parties, I conducted a hearing on July 7, 2015. On August 25, 2015, and September 15, 2015, I issued Initial Decisions ("ID") upholding the RIF.[1]

Employees appealed, and on March 7, 2017, the OEA Board upheld the IDs.[2] The decisions then were appealed to the D.C. Superior Court. On February 13, 2018, the D.C. Superior Court held that, while there was substantial evidence to support the grounds for upholding the validity of the RIF, the burden of proof on whether Agency considered job sharing and reduced hours rested with Agency, not Employees. Thus the D.C. Superior Court remanded the matter to the undersigned with instructions for further proceedings consistent with its

1 *Abedoye v. MPD*, OEA Matter No. 2401-0024-12 (August 25, 2015) and *Boone v. MPD*, OEA Matter No. 2401-0019-12 (September 15, 2015). In the interest of judicial efficiency and at the request of the parties, these two matters were consolidated for the remand.
2 *Abedoye v. MPD*, OEA Matter No. 2401-0024-12, *Opinion and Order on Petition for Review* (March 7, 2017) and *Boone v. MPD*, OEA Matter No. 2401-0019-12, *Opinion and Order on Petition for Review* (March 7, 2017).

opinion.[3] Specifically, the Court seeks a determination of whether Agency proved that it considered job sharing and reduced hours in carrying out its RIF action.

I held a status conference on March 16, 2018, and ordered the submission of information and briefs by close of business July 13, 2018. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Agency met its burden of proof that it implemented D.C. RIF statute, D.C. Official Code §1-624.02(a)(4).

2. If not, then whether Agency's action separating Employees pursuant to a RIF should be upheld.

Position of The Parties

Agency argues that it has proven by a preponderance of the evidence that it considered job sharing and reduced hours before it implemented its RIF. Agency also argues that, even if it failed to do so, such was harmless error. Employees argue that this omission by Agency is fatal to the RIF and that they should be returned to work.

ADDITIONAL FINDINGS OF FACT, ANALYSIS AND CONCLUSION[4]

Whether Agency met its burden of proof regarding job sharing and reduced hours in carrying out its RIF action.

The RIF statute clearly provides that Agency should consider job sharing and reduced hours for employees that have been subjected to a RIF. Of specific relevance to this case are D.C. Official Code § 1-624.02, which tracks the Omnibus Personnel Reform Amendment Act (OPRAA) of 1998 § 101(x). This section reads in pertinent part as follows:

D.C. Official Code § 1-624.02. Procedures

(a) Reduction-in-force procedures shall apply to the Career and Educational

---

3 *Abedoye v. MPD*, Case No. 2017 CA 2469 (D.C. Super. Ct. February 13, 2018) and *Boone v. MPD*, Case No. 2017 CA 2471 (March 13, 2018).

4 These findings of fact are in addition to the findings of fact listed in the August 25, 2015, Abedoye ID and September 15, 2015, Boone ID and are incorporated herein.

Services . . . and *shall* include:
(1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
(2) One round of lateral competition limited to positions within the employee's competitive level;
(3) Priority reemployment consideration for employees separated;
(4) *Consideration of job sharing and reduced hours*; and
(5) Employee appeal rights. *See* D.C. Official Code § 1-624.04. [emphasis applied.]

Agency argues, however, that Chapter 24 of the District of Columbia Personnel Manual ("DPM" or "DCMR"), which sets forth the District of Columbia Personnel Regulations regarding RIFs, made the consideration of job sharing and reduced hours optional. *See* 6B DCMR § 2400 *et seq.* Specifically, 6B DCMR § 2403.2 states: "An agency *may*, within its budget authorization, take appropriate action, prior to planning a reduction in force, to minimize the adverse impact on employees or the agency. Examples of such actions are the following: (a) Job sharing and reduced working hours under section 2404 of this chapter[.]" [emphasis applied.]

I find that Agency is wrong in this regard, as the plain meaning of the statutory language is not ambiguous and the intent of the legislature is clear. Where there is a contradiction between a statute and a regulation that implements that statute, then the plain meaning of D.C. Official Code § 1-624.02 supersedes the contradicting language of 6B DCMR § 2403.2.[5]

Looking at the evidence presented at the hearing, the only testimonial evidence presented by Agency on its efforts regarding the consideration of job sharing and reduced hours is as follows:

Barry Gersten (Transcript p. 63)

Barry Gersten was the Chief Information Officer of the MPD's Office of Information Technology who sought to improve operational performance by replacing staff for personnel with higher technical capabilities.

Q: So you know if they were retained by MPD or outsourced to other organizations?

Gersten: It varies by position. Some were outsourced. Some were retained.

Q: So some of the employees could have been transferred to another area?

Gersten: I'm not sure how to answer that. I can't answer that.

---

5 See *Expedia, Inc. v. District of Columbia*, 120 A.3d 623 (2015).

Diana Haynes Walton (Transcript p. 94-95)

Diana Haynes Walton is Agency's Director of Human Resources. She testified that Gersten discussed his plan to realign his IT staff and she then provided the advice and resources to properly implement the RIF in accordance with D.C. rules and regulations.

> Q: Are you aware of whether Mr. Gersten considered job sharing or reduced hours prior to conducting – or compressing the Realignment?
> .....
> Walton: I don't – I am not aware.

Agency claims that it met its burden of proof that it considered job sharing or reduced hours when Walton testified that she consulted with Lewis Norman on the appropriate way to implement the RIF and when Lewis Norman testified that Agency met the personnel guidelines in implementing the RIF.[6]

In other words, Agency wants us to believe that since it sought guidance in implementing its RIF, we should just assume that it followed every directive of the relevant statutes and regulations. However, when Agency's witnesses were directly asked regarding whether he or she considered job sharing or reduced hours, they replied they did not know. Thus, the evidence contradicts Agency's assertion.

I therefore, find that Agency failed to meet its burden of proof that it considered job sharing or reduced hours when it implemented its RIF.

Whether Agency's action separating Employees pursuant to a RIF should be upheld.

With respect to a RIF, 6-B DCMR § 2405.7 provides the following:

> The retroactive reinstatement of a person who was separated by a reduction in force under this chapter may only be made on the basis of a finding of a harmful error as determined by the personnel authority or the Office of Employee Appeals. To be harmful, an error shall be of such a magnitude that in its absence the employee would not have been released from his or her competitive level.

Thus, for the error to be considered harmless, the evidence must show that even if Agency had considered job sharing and reduced hours, the affected employees would still have been subjected to a RIF.

---

6 Agency's Brief in Response to Order dated April 30, 2018, p. 5-7.

Based on the testimonial evidence presented at the hearing, I find that it is undisputed that Agency's entire Office of the Chief Information Officer was revamped and realigned to better cope with its data information technology needs. All of the positions in that Office were abolished. Some of the staff were sent to other organizations while the rest were RIFed. Only after the RIF was implemented, were new positions created that would better serve Agency's needs as evidenced from the following:

Diana Haynes Walton (Transcript p. 75-76)

> Q: Okay. Now, I think you mentioned the reason for RIFs. What were the reasons for the RIFs in this particular situation?
>
> Walton: In this case it was shortage of work, and I don't recall the other, but basically it was a shortage of work.
>
> Q: Okay. Let me see if I can refresh your recollection. I am going to have this marked as [Exhibit] 2...okay. And so what were the reasons for the --
>
> Walton: The realignment itself, and shortage of work.

Diana Haynes Walton (Transcript p. 87)

> Walton: There were – the new positions – at the time that the RIF took place, there weren't any new positions. There were – what Mr. Gersten did – he had proposed some new positions, but the new positions didn't come to fruition until sometime after the RIF. So he made the proposal, we got permission to conduct the RIF, the RIF was conducted. Once the RIF was conducted and the positions became vacant, then they had the funding to do – to create new positions. So the new positions that Mr. Gersten created probably didn't come to fruition until December of 2011 or so.

Diana Haynes Walton (Transcript p. 106)

> Walton: ...But if you're abolishing the entire job series and everyone in the series, then it's not going to have an impact.

Diana Haynes Walton (Transcript p. 110-111, 113)

> Walton: ...they were abolishing all the positions and they made a decision that none of those positions were going to be part of the reorganization and realignment...
>
> Walton: ...the purpose of the realignment was to abolish the positions that were – to abolish certain positions so that you could use the funding from those positions

to hire higher level Information Technology Specialists.

The following uncontroverted evidence also shows that the people subjected to the RIF did not have the technical skillset or certifications for either the new positions created nor were there any of the old positions left that used their skillsets.

Barry Gersten (Transcript p. 44)

Q: And Mr. Abedoye?

Gersten: He was in the admin group...He did some basic tracking of the budgets, he handled invoicing for outside agency use of some of our technologies. We had a charge back program. And he handled some procurements.

Samson Abedoye, Employee (Transcript p. 187)

Q: Okay. Now, when you were working for MPD, what was your position? What did you do?

Abedoye: I worked on the IT budget...I am in charge of preparing the annual non-personnel services budget. The non-personnel services budget means it doesn't include employees' name or employees' salaries and – or their leave or anything. It just means bank, goods, and services, contracts.

Barry Gersten (Transcript p. 50-51)

Q: Okay. Now, with respect to Mr. Gamble,[7] did he have the certifications that you believed were required to do the work of Microsoft?

Gersten: He did not.

Q: Okay. And likewise with Mr. Boone, did he have the certifications that you felt were necessary to perform the work of Microsoft?

Gersten: I would say that neither of the certifications or the years of experience and background required to do the work. [sic].

Q: Okay. They worked on mainframe. "They" being Mr. Gamble and Mr. Boone.

Gersten: Mr. Boone worked on mainframe.

---

7 Gamble is an employee who was also RIFed.

Q: He worked on mainframe. Okay. And, I guess, the mainframe had been outdated or eliminated?

Gersten: It had been retired. So it had been replaced with other new technologies.

...

Q: Okay. So at the time you arrived, what was Mr. Boone doing?

Gersten: He was providing support for some documentation on the old systems, kind of doing some housecleaning as we retire those and put them away.

Employees argue that Agency should have given the RIFed employees new training so that they could transition to the new positions created. However, the parties did not cite any law or regulation that obligates Agency to incur this additional cost. In addition, the following evidence reveals that even after some of these employees did undergo additional training, they still lacked the technical proficiency and required certifications for the new positions.

Barry Gersten (Transcript p. 52-53)

Administrative Judge: And did the Agency think about giving them the training so they could get the certifications?

Gersten: I think for many of the people impacted by the RIF, they actually did have to go through the training, but that they didn't retain or have the skills to do the work, though. [sic].

Administrative Judge: They went through the training, but they didn't pass the test.

Gersten: They didn't take the test. They went through some training in some of the areas that we were pursuing, but they did not use those skills or absorb or retain them. So the training was not effective for them to contribute to the footwork that we were trying to get done.

Barry Gersten (Transcript p. 59-60)

Q: You testified that the employees—or some of the employees were RIF'd because they lacked the skill set to perform Microsoft...How did you know they lacked the skill set to perform Microsoft?

Gersten: From interactions with them, requesting them to perform certain tasks and them being unable to do so.

...So the tests are at the initiative of the employee. They are not a directive. There

could be a requirement for them in some positions, but it's not a directive from me that they need to take the test.

Q: Did any of the contractors perform work that had been performed by employees who were RIF'd?

Gersten: No.

Diana Haynes Walton (Transcript p. 112-113)

Q: But there was nothing requiring the positions occupied by individuals to be abolished; correct? The 334 positions that were occupied by individuals, nothing required you to abolish them in 2011? Nothing changed, correct?

Walton: Well, what changed was Mr. Gersten did an assessment of his staff and determined he needed IT (Information Technology) specialists. And IT, if you look at the job series for Computer Specialists and the job series for IT Specialists, they're different jobs.

Thus, based on the evidence adduced at the hearing, I make the following additional findings of fact: The separated Employees were the only members of his or her competitive level; their former positions were abolished; and their technical skills and/or certifications did not meet the new job requirements. I also find that despite whatever additional training that Employees underwent, they still failed to exhibit the required technical proficiency or pass the certification required for positions created after the realignment. I also find that because Agency's computer related positions were to be abolished, there were no positions for Employees to job share nor were reduced hours an option.

Therefore, I find that even if Agency had considered job sharing and reduced hours for Employees, the RIF would still have occurred. Accordingly, I conclude that, based on these particular set of facts, Agency's failure to either consider job sharing and reduced hours, or more specifically, its failure to meet its burden of proof that it considered such, is harmless error. Thus, in accordance with 6-B DCMR § 2405.7, the RIF is upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employees's positions through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

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

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.

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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:

Samson Abeboye
1616 Marion Street, NW
137
Washington, DC 20001

Darryl Boone
901 Hamilton Street, NW
Washington, DC 20011

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

Robert J. Shore
Federal Division/District of Columbia Headquarters
1020 N. Fairfax Street, Suite 200
Alexandria, VA 22314

Katrina Hill
Clerk

August 21, 2018
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

DARRYL BOONE, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 006783 P(MPA) Judge Florence Y. Pan

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Darryl Boone v. Metropolitan Police Department,* OEA Matter No. 2401-0019-12R18. The record consists of two volumes containing sixty-five (65) 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 9th day of November, 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.
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Washington, DC 20024
(202)727-0004
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

DARRYL BOONE, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 006783 P(MPA) Judge Florence Y. Pan

CERTIFICATE OF FILING[1]

I hereby certify that this is the true and correct official case file in the matter of *Darryl Boone v. Metropolitan Police Department,* OEA Matter No. 2401-0019-12R18. The record consists of two volumes containing sixty-five (65) 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 9th day of November, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

[1] At the request of Judge Pan a courtesy copy of the record was delivered to chambers. The record was filed in Superior Court on November 9, 2018.

RECEIVED BY: ORICA Hartfield

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

DARRYL BOONE,
Petitioner

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,
Respondent.

Case No. 2018 CA 006783 P(MPA)

Judge Florence Pan

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 Metropolitan Police Department and Darryl Boone which include the social security number and date of birth for Darryl Boone. 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 the Petitioner and Intervenor Metropolitan Police Department do not object to this motion.

Respectfully submitted,

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 31st day of October, 2018, the forgoing Respondent District of Columbia Office of Employee Appeals' Motion to Seal Record was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Robert Shore
Counsel for Petitioner

Frank McDougal
Andrea Comentale
Counsels for Intervenor

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
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202.727.0738
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DARRYL BOONE	:	Case Number: 2018 CA 6783 P(MPA)
v.	:	Judge: Florence Y. Pan
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS	:	Scheduling Conference: January 11, 2019

ORDER

This matter comes before the Court upon consideration of respondent's Motion to Seal Record ("Resp. Mot."), filed on October 31, 2018. Respondent asks that this case to be sealed in the court records, representing that, "[i]n accordance with Agency Rule 1(e), Respondent D.C. Office of Employee Appeals is required to file with the Clerk the entire agency record," which "contains documents that were submitted by the Metropolitan Police Department and Darryl Boone which include the social security number and date of birth for Darryl Boone." *See* Resp. Mot. at 1. Respondent represents that petitioner Darryl Boone and intervenor Metropolitan Police Department do not object to the motion. *See id.* at 2.

Pursuant to Rule 5-III, "[a]bsent statutory authority, no case or document may be sealed without an order from the Court. Any document filed with the intention of being sealed shall be accompanied by a motion to seal or an existing order. The document will be treated as sealed, pending the ruling on the motion." *See* Super. Ct. Civ. R. 5-III(a)(1). Furthermore, the comments to the 2017 amendments indicate that "Rule 5-III(a)(3) does not prohibit the court, in the appropriate exercise of its discretion, from sealing documents already in the public record on motion of a party or on its own initiative." *See* Super. Ct. Civ. Rule 5-III(a)(3) cmt. (2017); *see also* Super. Ct. Civ. R. 5-III(a)(3) ("failure to file a motion to seal will result in the pleading or document being placed in the public record.").

Accordingly, it is this 8th day of November, 2018, hereby:

ORDERED that respondent's motion is **GRANTED**; and it is further

ORDERED that all past or future public court records in this case be sealed, and shall remain under seal; and it is further

ORDERED that the records may be made available only upon the demand of the respondent or by an order of the Court; and it is further

ORDERED that a hard copy of the agency record be mailed or hand-delivered to chambers; and it is further

ORDERED that the initial scheduling conference scheduled for December 28, 2018, is vacated and rescheduled to Friday, January 11, 2019, at 9:30 a.m. in Courtroom 415, due to a scheduling conflict with the Court.

SO ORDERED.

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

Copies to:

Robert Shore, Esq.
Counsel for Petitioner

Frank McDougal, Esq.
Andrea Comentale, Esq.
Counsel for Intervenor

Lasheka Brown Bassey, Esq.
Counsel for Respondent

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

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

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge JOHN M CAMPBELL
Date: April 3, 2018
Initial Conference: 9:30 am, Friday, June 29, 2018
Location: Courtroom 519
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

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

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

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

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

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

Chief Judge Robert E. Morin

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

Petitioner,

v.

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

Respondent.

No. 2018 CA 002192 P(MPA)

PETITION FOR REVIEW OF AGENCY DECISION

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

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

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

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

B. Address of Respondent Agency:

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

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

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

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

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

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

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

Date: March 28, 2018

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

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

/s/ Andrea G. Comentale

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

CERTIFICATE OF SERVICE

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

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

Charis Toney
7701 Starshine Drive
District Heights, Maryland 20747

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

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

EXHIBIT 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

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

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

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

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

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

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the two fifteen (15) day suspensions were appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

BURDEN OF PROOF

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

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

OEA Rule 628.2 *id.* states:

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

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

SUMMARY OF TESTIMONY

On October 17, 2017, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-Chief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Employee's Case-In-Chief

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

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

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

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

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

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

Employee's Position

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

Agency's position

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

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

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

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

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

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

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[8] *Id.*

[9] Thirty days were comprised of two fifteen day suspensions to be served consecutively.

[10] Employee's Petition for Appeal at Final Agency Notice (June 8, 2017).

[11] Agency's Closing Arguments at Page 17. (December 1, 2017). It should be noted that Agency in making this argument provided no subsequent documentation, the CBA or otherwise, that would substantiate this assertion. Rather, Agency relied on the testimony provided by Ms. Gria Hernandez during the Evidentiary Hearing on October 17, 2017.

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

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

ANALYSIS

Appropriate Version of DPM

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

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

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

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

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

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

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

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

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

Whether Agency had cause for adverse action

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether the Penalty was Appropriate

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

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

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

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

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

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

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

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

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

ORDER

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

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

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

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

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

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

CERTIFICATE OF SERVICE

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

Charis Toney
7701 Starshine Drive
District Heights, MD 20747

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

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

Katrina Hill
Clerk

February 21, 2018
Date

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Sampson Adeboye
1616 Marion Street, NW
Apt. 137
Washington, D.C. 20001

Petitioner,

v.

DISTRICT OF COLUMBIA,
Office of Employee Appeals

Serve on: Sheila Barfield, Esq.
Executive Direct
Office of Employee Appeals
955 L'Enfant Plaza, Suite 2500
Washington, DC 20024
Respondent.

Civil Action No.:

Judge:

Dated: September 24, 2018

PETITION FOR REVIEW OF AGENCY DECISION

Notice is hereby given that Petitioner, Sampson Adeboye, appeals to the Superior Court of the District of Columbia the Initial Decision on Remand of Senior Administrative Judge (AJ) Joseph E. Lim of the District of Columbia Office of Employee Appeals (OEA), issued on August 21, 2018, when it was served by regular mail, and all rulings encompassed therein, in the matter of Sampson Adeboye v. D.C. Metropolitan Police Department, OEA Matter No. 2401-0024-12R18. Copies of the Administrative Judge's Initial Decision on Remand, as well as the Superior Court of the District of Columbia's Remand Order which remanded this matter to AJ Lim after he issued an Initial Decision which was upheld by OEA Board, are attached hereto as *Attachments 1 and 2* respectively.

A. Description of Decision and Order:

On August 21, 2018, AJ Lim issued an Initial Decision on Remand, upholding the District of Columbia Metropolitan Police Department's (MPD) 2011 removal of Petitioner through a Reduction in Force (RIF). Petitioner challenged his removal alleging that the RIF was not conducted in accordance with applicable rules, laws and regulations, specifically that MPD had failed to consider job sharing or reduced hours prior to conducting the RIF.[1] In his Decision on Remand, AJ Lim found that MPD did not consider job sharing or reduced hours, but upheld the RIF nonetheless. *Attachment 1*, at p. 4, 8.

Concise Statement of the Agency Proceedings and the Decisions as to Which Review is Sought and the Nature of the Relief Requested by Petitioner:

Petitioner, Mr. Sampson Adeboye, was an employee of MPD until he was removed from his position on October 14, 2011, as the result of a realignment and RIF. Petitioner timely filed a Petition for Appeal of his removal with OEA on November 10, 2011.

After Petitioner's case was assigned to AJ Lim, AJ Lim determined that the general RIF Statute, found in D.C. Code §1-624.02 and §1-624.04 applied to this RIF, not the Abolishment Act. D.C. Code §1-624.04 states an employee can appeal a RIF to the Office of Employee Appeals on the basis that, "he or she believes that his or her agency has incorrectly applied the provisions of this subchapter or the rules or regulations issued pursuant to this subchapter." *D.C. Code §1-624.04.*

Numerous briefs and filings were made throughout the Appeal process and an evidentiary hearing was held on July 7, 21015. Since the AJ determined that the broader RIF statute applied

[1] Numerous other arguments were raised during the appeal of this 2011 RIF, however, this is the only argument that was addressed in AJ Lim's August 21, 2018, Initial Decision on Remand.

to the RIF rather than the Abolishment Act, he was obligated to address any issues and arguments raised by Petitioner that Petitioner believed established that the Agency's RIF was not performed in accordance with applicable rules, laws and regulations.

On August 31, 2015, the AJ issued his Initial Decision and found that the Agency's RIF complied with all applicable rules, laws and regulations. Petitioner then filed a Petition for Review with OEA's Board on October 5, 2015 and on March 7, 2017, the Board issued its Opinion and Order on Petition for Review, denying the Petition for Review.

On April 7, 2017, Petitioner filed a Petition for Review with the Superior Court for the District of Columbia regarding the OEA's Decision upholding MPD's RIF of Petitioner. On February 18, 2018, Judge Florence Y. Pan issued an Order, granting the Petition for review and remanded the matter back to the OEA to determine whether or not the Agency considered job sharing and reduced hours, as required by D.C. Code 1-624.02(a). On August 21, 2018, AJ Lim issued an initial Decision on Remand, finding that the Agency failed to consider job sharing and reduced hours as required by D.C. Code 1-624.02(a), but upheld the RIF of Petitioner nonetheless.

Petitioner hereby files this Petition for Review regarding the AJ's Initial Decision on Remand in accordance with Superior Court Civil Procedure Rules, XV, Agency Review, Rule 1, asserting that the AJ's decision is contrary to law and not supported by substantial evidence. Therefore the AJ's Decisions should be reversed.

B. Address of Respondent, Agency or Official:

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

C. Names and Addresses of All Other Parties to the Agency's Proceedings:

District of Columbia Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

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

Sheila Bartfield, Esq.
Executive Director
Office of Employee Appeals
1100 Fourth Street, SW Suite 620 East
Washington, D.C. 20024

Peter Newsham
Chief of Police
District of Columbia Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

Karl Racine, Attorney General
c/o Andrea Comentale, Esq.
Section Chief—Personnel and Labor Relations
c/o Frank McDougald, Esq.
Assistant Attorney General
Personnel and Labor Relations Section
Office of the Attorney General
441 Fourth Street, NW
Room 1180N
Washington, D.C. 20001

E. Copy of The Agency's Decision or Order Sought to be Reviewed:

A copy of the Agency Decision and Order sought to be reviewed are attached to this Petition.

Dated: September 24, 2018

Respectfully submitted,

Robert J. Shore, Esq. (DC Bar No. 999552)
Assistant General Counsel
National Association of Government Employees
1020 N. Fairfax Street, Suite 200
Alexandria, VA 22314
Telephone: (703) 519-0300
Facsimile: (703) 519-0311
RShore@nage.org

Attorney for Petitioner

CERTIFICATE OF SERVICE

Although proof of service will be filed separately with the Court once this Petition is accepted, I hereby certify that a true and correct copy of the foregoing Petition for Review of Agency Decision will be served via certified mail, return receipt requested, on the following:

Sheila Barfield, Esq.
Executive Director
Office of Employee Appeals
955 L'Enfant Plaza, Suite 2500
Washington, DC 20024

Peter Newsham
Chief of Police
District of Columbia Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

Karl Racine, Attorney General
c/o Loren AliKham
Solicitor General
Office of the Attorney General for the District of Columbia
One Judiciary Square
441 Fourth Street, NW
Room 630 South
Washington, D.C. 20001

Date: September 24, 2017

Robert J. Shore, Esq. (DC Bar No. 999552)
Assistant General Counsel
National Association of Government Employees
1020 N. Fairfax Street, Suite 200
Alexandria, VA 22314
Telephone: (703) 519-0300
Facsimile: (703) 519-0311
RShore@nage.org

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

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

Respectfully submitted,

Lasheka Brown Bassey

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

Andrea Comentale, Esq.
Jhumur Razzaque, Esq.
Counsels for Petitioner

Janea J. Hawkins, Esq.
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
Lasheka.Brown@dc.gov

Exhibit 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

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

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

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

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

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

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the two fifteen (15) day suspensions were appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

BURDEN OF PROOF

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

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

OEA Rule 628.2 *id.* states:

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

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

SUMMARY OF TESTIMONY

On October 17, 2017, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-Chief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Employee's Case-In-Chief

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

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

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

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

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

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

Employee's Position

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

Agency's position

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

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

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

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

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

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

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

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

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

ANALYSIS

Appropriate Version of DPM

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

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

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

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

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

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

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

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

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

Whether Agency had cause for adverse action

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether the Penalty was Appropriate

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

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

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

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

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

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

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

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

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

ORDER

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

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

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

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

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

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

CERTIFICATE OF SERVICE

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

Charis Toney
7701 Starshine Drive
District Heights, MD 20747

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

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

Katrina Hill
Clerk

February 21, 2018
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

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

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
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Washington, DC 20024
202.727.0738
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CERTIFICATE OF SERVICE

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

Andrea Comentale, Esq.
Jhumur Razzaque, Esq.
Counsels for Petitioner

Janea J. Hawkins, Esq.
Counsel for Intervenor

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
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Exhibit 1

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

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

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

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

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

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

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the two fifteen (15) day suspensions were appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

BURDEN OF PROOF

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

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

OEA Rule 628.2 *id.* states:

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

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

SUMMARY OF TESTIMONY

On October 17, 2017, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-Chief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Employee's Case-In-Chief

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

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

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

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

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

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

Employee's Position

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

Agency's position

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

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

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

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

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

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

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

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

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

ANALYSIS

Appropriate Version of DPM

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

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

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

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

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

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

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

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

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

Whether Agency had cause for adverse action

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether the Penalty was Appropriate

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

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

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

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

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

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

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

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

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

ORDER

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

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

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

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

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

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

CERTIFICATE OF SERVICE

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

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Katrina Hill
Clerk

February 21, 2018
Date