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Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

Petitioner,

v.

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

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

Respondent.

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OFFICE OF EMPLOYEE APPEALS

No. 2018 CA 003991 P(MPA)

PETITION FOR REVIEW OF AGENCY DECISION

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

B. Description of Judgment or Order:

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

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

C. Address of Petitioner:

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

D. Names and addresses of other parties:

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

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

E. Names and Addresses of Parties to be Served:

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

Dated: June 5, 2018

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

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

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

/s/ Nada A. Paisant
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CERTIFICATE OF SERVICE

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

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

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

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

ATTACHMENT 1

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

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

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

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

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

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

JURISDICTION

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

ISSUES

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

BURDEN OF PROOF

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

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

OEA Rule 628.2 *id.* states:

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

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

STATEMENT OF THE CHARGES

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

> Charge No 1: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offense shall promptly report, or have reported their involved to their commanding officers."
>
> Specification No 1: In that on or about August 11, 2016, you pled guilty to Domestic Violence Simple Assault (Case #2016DVM000218) and agreed to a deferred sentencing plea agreement with the United States Attorney's Office (USAO).
>
> Specification No 2: In that, on or about February 1, 2016, an arrest warrant charging you with Domestic Violence Simple Assault was issued by the District of Columbia, Superior Court Judge John Bayly. You were subsequently arrested on February 4, 2016.
>
> Specification No 3: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband.
>
> Specification No 4: In that, on December 27, 2015, in an unprovoked attack, you physically assaulted Ms. Tije Holland while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, causing serious injury to Ms. Holland's face, mouth and eye.
>
> Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-17 which reads in part, "...falsification of official records or reports."
>
> Specification No. 1: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC. You filed this report knowing it was not factual.
>
> Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the

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

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

SUMMARY OF THE TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Panel Findings

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

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

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

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

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

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

ANALYSIS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether there was harmful procedural error.

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

90-Day Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Due Process

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

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

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

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

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

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

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

Whether the Penalty Was Appropriate

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

ORDER

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

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

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

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

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

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

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

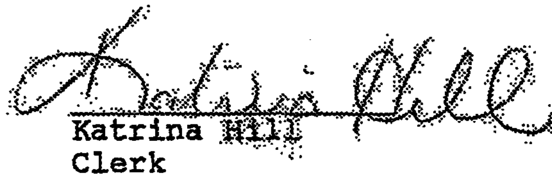
CERTIFICATE OF SERVICE

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

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

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

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



Katrina Hill
Clerk

April 30, 2018
Date

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

DISTRICT OF COLUMBIA METROPPOLITAN POLICE DEPT.
Vs.
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

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

INITIAL ORDER AND ADDENDUM

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

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

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

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

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

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

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

Chief Judge Robert E. Morin

Case Assigned to: Judge HIRAM E PUIG-LUGO
Date: June 6, 2018
Initial Conference: 9:30 am, Friday, September 07, 2018
Location: Courtroom 317
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

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

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

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

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

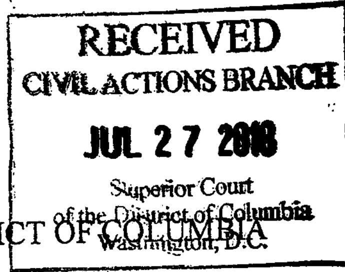
No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to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

Chief Judge Robert E. Morin

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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



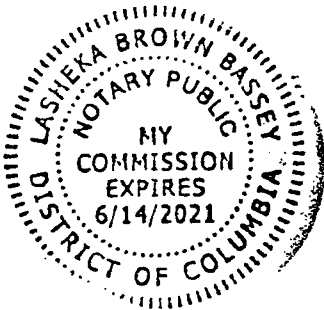
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

CERTIFICATE OF FILING

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

Wynter Clarke
Wynter Clarke
Paralegal Specialist



District of Columbia: SS
Subscribed and Sworn to before me
this 27th day of July, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

Filed
D.C. Superior Court
07/27/2018 15:04PM
Clerk of the Court

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

MOTION TO SEAL RECORD

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

Respectfully submitted,

Lasheka Brown Bassey

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

CERTIFICATE OF SERVICE

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

Nada Paisant
Counsel for Petitioner

John H. Schroth
Counsel for Sheila Thomas-Bullock

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

Filed
D.C. Superior Court
08/03/2018 09:26AM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA METROPOLITAN	:	
POLICE DEPARTMENT	:	
Petitioner,	:	**2018 CA 003991 P(MPA)**
	:	**Judge Hiram E. Puig-Lugo**
v.	:	
	:	
D.C. OFFICE OF EMPLOYEE APPEALS,	:	
Respondent.	:	

ORDER

This matter comes before the Court upon Respondent's Motion to Seal, filed July 27, 2018. Respondent states that no counsel object to this request.

Super. Ct. Civ. R. 5-III suggests that all cases are filed on the public docket unless statutory authority or a written court order allows for the sealing of a case or document. Failure to adhere to Super. Ct. Civ. R. 5-III "will result in the pleading or document being placed in the public record." Super. Ct. Civ. R. 5.2 requires the redaction of certain types of information from filings unless ordered otherwise.

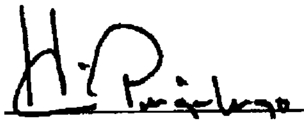
Respondent requests to seal the entire agency record "to maintain the record in its original form and to protect the privacy of those involved." Pl. Mot. The Court finds good cause for this consent request.

Accordingly, it is this 3rd day of August, 2018,

ORDERED that Respondent's Motion to Seal is **GRANTED**; and it is further

ORDERED that Respondent D.C. Office of Employee Appeals may file the entire agency record in accordance with Super. Ct. Agency Review R. 1(e) under seal.

SO ORDERED.



Judge Hiram E. Puig-Lugo
Associate Judge
(*Signed in Chambers*)

Copies via e-service to:
Nada Paisant, Esq.
Lasheka Brown Bassey, Esq.
John Schroth, Esq.

Filed
D.C. Superior Court
11/09/2018 10:29AM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on September 6, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision in the matter of *Sheila Thomas Bullock v. D.C. Metropolitan Police Department*, OEA Matter Number 1601-0039-17 (April 30, 2018) as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on this 9th day of November, 2018, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Nada A. Paisant
Counsel for Petitioner

John H. Schroth
Counsel for Intervenor

Respectfully submitted,

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Exhibit 1

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

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

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

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

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

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

JURISDICTION

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

ISSUES

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

BURDEN OF PROOF

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

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

OEA Rule 628.2 *id.* states:

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

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

STATEMENT OF THE CHARGES

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE TESTIMONY

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

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

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

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

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

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

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

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

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

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

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

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

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

__Agent Trina Johnson ("Johnson") (Tr. Pages 113-126)__

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

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

__Lieutenant Han Kim ("Kim") (Tr. Pages 131-149)__

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Panel Findings

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

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

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

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

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

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

ANALYSIS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

<u>Whether Adverse Action Panel's Decision was supported by Substantial Evidence</u>

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

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

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

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

Whether there was harmful procedural error.

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

90-Day Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Due Process

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

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

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[24] *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018. See also
[25] Employee's Brief at Page 27-28 (December 22, 2017).
[26] *Id.* at Page 26. citing *Lightfoot v District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006).

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

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

Whether the Penalty Was Appropriate

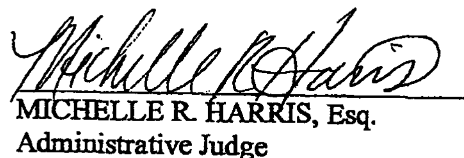
Because I find that Agency committed harmful procedural error and failed to appropriately follow all applicable laws, rules and regulations, I further find that Employee's termination must be reversed.

ORDER

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

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

FOR THE OFFICE:



MICHELLE R. HARRIS, Esq.
Administrative Judge

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

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

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

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

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

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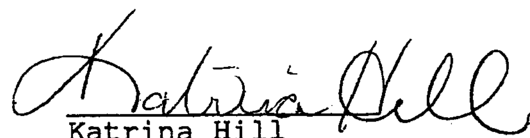
Washington, DC 20001



Katrina Hill
Clerk

April 30, 2018
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RECEIVED
2017 DEC 20 PM 3: 29
OFFICE OF
EMPLOYEE APPEALS

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

PETITION FOR REVIEW OF AGENCY DECISION

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

Description of Judgment, Order or Decision:

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

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

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

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

B. Address of Respondent

District of Columbia Office of Employee Appeals

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

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

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

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

D. Names and addresses of parties to be served:

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

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

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

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

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

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

CERTIFICATE OF SERVICE

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

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

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

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

ATTACHMENT 1

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

OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA
2017 NOV 13 P 1:50

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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

OPINION AND ORDER
ON
REMAND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D.C. Superior Court's Instructions on Remand

In his June 8, 2016, Order, the Honorable Judge Robert Okun remanded this matter to the AJ to specifically address the following question: "[d]id District of Columbia Regulation § 1613.2 prohibit *Chief Ramsey* from increasing Petitioner's penalty?" (emphasis added). According to Judge Okun, the AJ failed to address the issue of whether Agency's GO was superseded by the relevant DCMR regulation. He went on to state that "[t]he court finds nothing in the administrative record or the IDR to suggest that OEA concluded that General Order 120.21 granted Chief Ramsey the authority to act in a way prohibited by the municipal regulations of the District of Columbia."[16] As such, Agency's argument that the penalty of termination was actually recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett, is non responsive to the question presented on remand because it exceeds the purview of Judge Okun's instructions. Accordingly, D.C. Superior Court has already determined that the

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

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

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

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

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

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

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

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

L. Adverse Action Appeals

(4) When an appeal is made, the appropriate papers shall be forwarded to the Chief of Police, who may affirm or modify the findings and/or the penalty imposed, remand the case to a previous step in the process, or remand the case for an alternative process, as he/she deems appropriate.

(5) The Chief of Police *may impose a higher penalty than recommended* by the Hearing Tribunal, *or the Assistant Chief, OHS.* (emphasis added)

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

Duties and Responsibilities of the Proposing Official: General Discipline

1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, *but in no event shall he or she increase the penalty*. (emphasis added).

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

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

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

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

ORDER

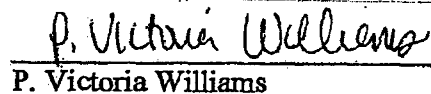
Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED.**

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson



P. Victoria Williams

Jelani Freeman

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

CERTIFICATE OF SERVICE

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

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

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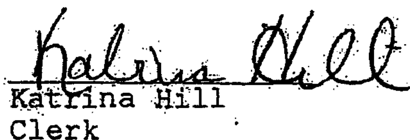
Katrina Hill
Clerk

November 7, 2017
Date

ATTACHMENT 2

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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAULA EDMISTON	)	OEA Matter No. 1601-0057-07R16
Employee	)	
	)	Date of Issuance: December 12, 2016
v.	)	
	)	Senior Administrative Judge
METROPOLITAN POLICE DEPARTMENT	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Ted Williams, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA
2016 DEC 19 P 2:50

2nd INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On March 7, 2007, Employee, a former Captain in the Police force, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") from Agency's final decision removing her from her position. After an attempted October 25, 2007, mediation,[1] I issued an Initial Decision ("ID") on April 30, 2008.[2] The ID reduced the penalty from a termination back to the Agency's original proposed penalty of demotion. On appeal, the OEA Board upheld the ID on January 25, 2010.[3]

Upon appeal, the Superior Court of the District of Columbia reversed the ID's final order and remanded the case to the undersigned to reconsider Employee's motion for summary judgment, consistent with its opinion.[4]

On August 8, 2014, I issued an Initial Decision on Remand ("IDR") ruling on Employee's Motion for Summary Judgment and upholding Agency's penalty of termination. This IDR was appealed, and on June 8, 2016, the Superior Court of the District of Columbia reversed the IDR and remanded the matter back to the undersigned for reconsideration of

1 Notice of Mediation/Settlement Conference (October 4, 2007).
2 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07 (April 30, 2008).
3 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07, *Opinion & Order on Petition for Review* (January 25, 2010).
4 *DC Metropolitan Police Dept. v. DC OEA & Edminston*, Case Number 2008 CA 004804 (D.C. Super. Ct., Oct. 9, 2013).

Employee's motion for summary judgment, consistent with its opinion.[5]

I granted the parties' request for a stay of the proceedings pending the D.C. Superior Court's ruling on a similar issue on an unrelated case. Subsequently, after several conferences held with the parties, I ordered the parties to submit their legal briefs by November 15, 2016. 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 MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2

2. What is the proper penalty for Employee in this matter.

FINDINGS OF FACT

Based on the record and the stipulated facts, the following facts are undisputed:

1. Paula Edmiston ("Employee") was appointed to the Metropolitan Police Department ("MPD" or "Agency") in 1984 and on April 1, 2006, Employee held the rank of Captain with the MPD, Second District.

2. At an Agency-sponsored event on April 1, 2006, Employee told fellow officers about her remarks to a female cashier at the grocery store and then to a fellow patron at another grocery.[6] When subsequently confronted by her superiors, Employee denied the charges and implicated a fellow officer.

3. Effective April 13, 2006, Agency issued General Order ("G.O.") 120.21 regarding disciplinary procedures and processes. With regard to adverse action appeals, that G.O. provided, *inter alia*, that the Chief of Police ("COP") or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the the Hearing Tribunal, or the Assistant Chief of Human Services. (G.O. 120.21, p. 17).

4. G.O. 120.21 replaced G.O. 1202.1, which was essentially similar to the new order, but had no provision allowing the COP to impose a penalty higher than the one initially recommended.

5 *DC Metropolitan Police Dept. v. DC OEA & Edminston*, Case Number 2014 CA 007504 (D.C. Super. Ct., Jun. 8, 2016).

6 Employee called the cashier a faggot and threatened to kick a patron's faggot ass. *See* Final Notice of Adverse Action dated July 25, 2006.

5. DCMR § 1613.2 states, in part, "the deciding official ... in no event shall he or she increase the penalty."

6. At all relevant times, 6-B DCMR § 1613.2 was in effect.[7] The full text of this particular regulation is as follows:

1613 Duties and Responsibilities of Deciding Official: General Discipline

> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

7. On June 2, 2006, pursuant to G.O 120.21, Assistant Chief of Human Services ("ACHS") Shannon Cockett served Employee with a proposed Notice of Adverse Action ("Notice") to demote Employee to the rank of lieutenant based on three charges of misconduct: (1) Conduct unbecoming an officer; (2) Failure to obey orders or directives; and (3) Willfully and knowingly making untruthful statements.[8] Each charge contained specifications to support it.

8. This Notice was issued forty-four business days from April 1, 2006, the day Agency learned of Employee's conduct. Agency does not allege that it undertook a criminal investigation of the incident.

9. The Proposed Notice advised Employee that she had fifteen (15) days to respond to the charges and specifications and that if she failed to respond, a decision regarding the charges and specifications would be based upon the evidence of record.

10. On June 23, 2006, Employee submitted a response to the Proposed Notice.

11. On July 25, 2006, following a review of the documents submitted by Employee through counsel, Assistant Chief of Human Resources Cockett served Employee with a Final Notice of Adverse Action ("Final Notice"), demoting her to the rank of lieutenant, based upon a preponderance of evidence that Employee was guilty of the charged misconduct. The six-page document listed 26 findings and contained a conclusion that Employee was guilty of the charges and specifications listed in the Notice. The Final Notice stated: For the cited violations, you will be demoted to the rank of "Lieutenant."

7 Also found in 47 D.C. Reg. 7094, § 1613.2. (September 1, 2000).
8 Notice of Proposed Adverse Action.

12. The July 25, 2006, Final Notice advised Employee that she could appeal to the COP, and she had the right to appeal her adverse action to the OEA within 30 days of the final agency action.

13. On August 8, 2006, Employee chose to appeal the demotion to the COP asking that the demotion be reversed or the penalty mitigated.

14. On August 29, 2006, COP Charles H. Ramsey denied Employee's appeal, and further recommended that Employee be discharged.[9] Additionally, the COP remanded the adverse action for a hearing before a police trial board (Hearing Tribunal or Trial Board or Adverse Action Panel or Panel), "if Employee so elected."[10] The first paragraph acknowledged receipt of the appeal. The second paragraph said:

> After a thorough review of the record developed in this matter and your letter of August 8, 2006, I am denying your appeal. I have carefully reviewed the facts and circumstances surrounding the very serious charges and specifications in this case and have determined that there were no mitigating factors. Additionally, I have reviewed your work performance, disciplinary history and commendations. Based upon this review, I am recommending that you be discharged.

The third paragraph stated that the matter was to be scheduled for a hearing before the Trial Board "if you so elect," and the final paragraph stated that the letter constituted final Agency action in the matter.

15. Assistant Chief Cockett arranged for service of the Chief of Police's August 29, 2006, letter on Capt. Edmiston via a memo, also dated August 29, 2006, which characterized the decision of the Chief of Police as deciding that "the penalty should be amended from demotion to Removal."[11]

16. On August 31, 2006, Employee, through counsel, elected to have a hearing before a Trial Board Panel. On October 27, November 3, and November 27, 2006, Employee received a full evidentiary hearing before the Panel, which found Employee guilty of all three charges, and the underlying specifications, and unanimously recommended that Employee be terminated.[12]

17. On January 10, 2007, based on the Panel's recommendation, Agency issued a second Final Notice of Adverse Action notifying Employee she had been found guilty of all the charges and specification included in the Proposed Notice and that her removal from MPD would be effective March 2, 2007. The Notice further informed Employee that she could appeal the decision to the COP.

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9 Letter from Charles H. Ramsey, Chief of Police, to John V. Berry, Esq. dated August 29, 2006.
10 *Id.*
11 Memorandum dated August 29, 2006 to Inspector Second District from Assistant Chief Office of Human Services.
12 Parties' Proposed Stipulations of Fact. (October 14, 2016).

18. By letter dated February 1, 2007, Employee appealed to Acting Chief of Police Cathy Lanier.[13] On February 23, 2007, the COP denied Employee's appeal.[14]

19. Employee was charged with "Conduct Unbecoming an Officer," "Failure to obey orders or directives issued by the Chief of Police," and "Willfully and knowingly making an untruthful statement." She was removed from her position effective March 2, 2007.

20. On March 7, 2007, Employee filed a Petition for Appeal with the OEA.

21. On April 30, 2008, I issued an Initial Decision (ID) which modified Employee's penalty from a termination to a demotion.[15] Based on Employee's motion for summary judgment and Agency's response thereto, the ID held that Agency did not violate the 90-day rule,[16] and that Agency's General Order 120.21 was not retroactive, and thus, the proper penalty was not termination but the Agency's original proposed penalty of demotion.

22. On June 2, 2008, Employee appealed my ID with the OEA Board (Board) while Agency filed an appeal with the D.C. Superior Court on July 3, 2008. On June 9, 2009, the D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the OEA Board's decision.

23. On January 25, 2010, the Board rejected Employee's sole argument that she should have been granted a de novo hearing on the issue of her demotion.[17] The Board held that the Administrative Judge properly exercised his discretion to deny a de novo hearing based on the submissions of the parties and the applicable law. Reiterating that the judge has discretion on whether or not to grant a hearing, and based on the fact that the parties were given due process at a hearing at the Agency, the Board denied Employee's petition for review. The Board also held that Agency's appeal was untimely. Agency appealed this decision to the D.C. Superior Court on February 22, 2010.

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13 *Id.*
14 *Id.*
15 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07 (April 30, 2008).
16 The Police and Firefighters Disciplinary Action Procedures Act, Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031 (2005 Supp.), states:

> Commencement of corrective or adverse action.
> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

17 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07, *Opinion & Order on Petition for Review* (January 25, 2010).

24. On October 9, 2013, Superior Court Judge Judith Macaluso remanded the matter back to OEA for reconsideration of Employee's motion for summary judgment consistent with the Court's opinion that Agency's change of its appellate rules was not retroactive as one of the potential penalties had always included the ultimate one of termination.[18] The Court held that because one of the potential penalties had always been termination, and that the rule change under Agency's General Order 120.21 involved secondary conduct (Employee's prosecution of an appeal), and not a primary conduct (an expansion of causes of action and damages against a defendant's already completed primary conduct), the rule change was not retroactive at all. Thus, the Court concluded that Police Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for Employee.

25. On August 8, 2014, I issued an Initial Decision on Remand (IDR)[19] wherein I again held that Agency's action did not violate the 90-day rule and thus its action was timely. I also upheld Employee's termination since Agency's change of its appellate rules did not raise retroactivity issues and thus the Chief of Police could properly increase Employee's proposed penalty from a demotion to a termination.

26. On September 9, 2014, Employee appealed the IDR to the D.C. Superior Court.

27. On June 8, 2016, Superior Court Judge Robert Okum reversed the IDR and remanded this matter back to OEA to make a determination as to whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2 which can now be found at 47 D.C. Reg. 7094, § 1613.2.[20]

ANALYSIS AND CONCLUSION

Whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2

The sole issue that the Superior Court under Judge Okum remanded this matter for this Office to address was whether the police chief had authority to increase Employee's penalty under MPD General Order 120.21 despite its conflict with 6-B DCMR § 1613.2 which can now be found at 47 D.C. Reg. 7094, § 1613.2. In other words, whether 6-B DCMR § 1613.2 specifically prohibited the decision maker from increasing the penalty, and if so, whether this regulation superseded MPD's General Order 120.21.

Agency's response to the issue takes a different tack. First, Agency points out that after Employee's receipt of Agency's Notice of Proposed Adverse Action proposing her demotion from Captain to Lieutenant, it was Employee who appealed the notice to then COP Charles Ramsey. COP Ramsey denied the appeal and recommended termination. Agency pointed out that COP Ramsey did not impose termination as a penalty, but merely recommended it.

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18 *DC Metropolitan Police Dept. v. D.C. O.E.A. & Edminston.*, Case No. 2008CA 004804 P(MPA)(Oct. 9, 2013).
19 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07R14 (Aug. 8, 2014).
20 *Edminston v. DC Metropolitan Police Dept.,et. al.*, Case No. 2014 CA 007504 P(MPA)(Jun. 8, 2016).

Nevertheless, COP Ramsey acceded to Employee's election that she be granted an evidentiary hearing before a Trial Board Panel. After a three day hearing, the Panel notified Employee that it found her guilty of all three charges and specifications, and unanimously recommended that Employee be terminated.

Employee appealed the Panel's decision to the new COP, Cathy Lanier, who denied her appeal on February 23, 2007, and sustained the panel's recommendation of termination.

Based on these facts, Agency argues that MPD General Order 120.21 did not conflict with 6-B DCMR § 1613.2 because COP Ramsey was not the deciding official as envisioned by § 1613.2, but merely the appeals official. Agency goes on to state that the Panel was not required to recommend termination as a penalty, but was free to recommended a lesser penalty after determining that Employee committed misconduct. Agency then concludes that since COP Ramsey did not violate 6-B DCMR § 1613.2, the penalty of termination should be affirmed. Agency later repeats this argument after pointing out that only those provision of G.O. 120.21 that conflicted with 6 B DCMR § 1613 are superseded by the regulation.

Employee argues that Agency had no legal authority to change Assistant Chief Cockett's findings on the charges and increase the penalty from a demotion to a termination. Employee complains that Agency's brief is not responsive to the question presented by the Superior Court as Judge Okun had already concluded that COP Ramsey increased Employee's penalty. Employee points out that there is no question that G.O. 120.21 conflicts with 6 B DCMR § 1613 and that a regulation supersedes a G.O.

Agency's argument is disingenuous in pointing out that COP Ramsey was not the deciding official since he did not impose the higher penalty of termination. While that much is true, what Agency fails to point out is the fact that the deciding official who did impose the higher penalty of termination over the original proposed penalty of a demotion was then COP Lanier.

As the undisputed facts of this case bears out, in Agency's proposed June 2, 2006, Notice of Adverse Action, ACHS Shannon Cockett recommended that Employee be demoted to the rank of lieutenant. While COP Ramsey ordered a hearing before a Panel, it was COP Lanier who acted as a deciding official in imposing a termination upon Employee.

6-B DCMR § 1613 states as follows:[21]

1613. Duties and Responsibilities of Deciding Official: General Discipline

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

21 Chapter 16, General Discipline and Grievances, 47 D.C.Reg. 7094 (September 1, 2000)

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, ***but in no event shall he or she increase the penalty.*** (emphasis added).

As noted in the statement of facts above, G.O. 120.21 provided, *inter alia*, that the COP or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) ***impose a higher penalty than recommended by*** the the Hearing Tribunal, or ***the Assistant Chief of Human Services.*** (emphasis added).

It is evident that 6-B DCMR § 1613 conflicts with G.O. 120.21. In contrast to the G.O., the regulation limits the COP's choice of the severest penalty he or she can impose to the one recommended by the Assistant Chief of Human Services. Here, ACHS Cocket recommended a demotion, and COP Lanier may not impose the more severe penalty of termination.

Superior Court Judge Okum's order stated in part, "An agency's internal general orders or procedures do not override statutes and regulations.[22] Courts in this jurisdiction have held that 'an MPD General Order essentially served the purpose of an internal operating manual, and does not have the force or effect of a statue or an administrative regulation."[23] In addition, OEA itself recently concluded that an MPD general order that conflict with a municipal regulation was superseded by that municipal regulation, as 'statutes and regulations take precedence over an agency's internal procedures.'[24]

On August 4, 2016, in the case of *District of Columbia vs. Public Employee Relations Board, et.al.*, the Court of Appeals, in part, cited *District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998) (noting that an MPD General Order cannot override a regulation).

Thus, to answer Judge Okun's query, 6-B DCMR § 1613.2 supersedes MPD's General Order 120.21. 6-B DCMR § 1613.2 specifically prohibited the decision maker from increasing the penalty, and thus the police chief as the ultimate decision maker had no legal authority to increase Employee's penalty under MPD General Order 120.21.

<u>What is the proper penalty for Employee in this matter.</u>

The next issue to be dealt with is Agency's choice of penalty. Employee's contention that she was innocent of the charges, was refuted by her fellow officers in a police trial board hearing. Employee was given her due process rights as she was able to confront and cross-examine her accusers. , The Trial Board unanimously found her guilty of all charges, and recommended termination.

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22 See *District of Columbia v. Henderson,* 710 A.2d 874, 877 (D.C. 1998, *Nunnally v. DC Metro Police Dep't,* 80 A.3d 1004, 1012 (D.C. 2013).
23 *Nunnally,* 80 A.3d at 1012.
24 *In the Matter of Wilberto Flores v. Metro. Police Dep't,* OEA Matter No. 1601-0131-11, at pp. 6-7 (Mar. 29, 2016).

This Office's review of an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's workforce is a matter entrusted to the agency, not to this Office. 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 exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Indeed, this Office's scope of review is limited to a determination of whether the penalty is within the range allowed by the table of penalties, whether the penalty is based on relevant *Douglas* factors, and whether there is a clear error of judgment. *Taggert v. Metropolitan Police Department*, OEA Matter No. 2405-0113-92R94 (Jan. 9, 1998).

I cannot modify Agency's penalty unless it is so harsh as to amount to an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). Based on the Agency's Table of Penalties, the range of penalties for conduct unbecoming an officer, insubordination, or making an untruthful statement, all range from suspension to termination, even for a first offender.[25] Based on this standard, my review of the record taken as a whole, demonstrates that there is substantial evidence in the record to support the penalty of demotion. Here, Agency's decision to impose the penalty of termination constituted an abuse of discretion because the original penalty was increased in violation of the regulation. For the foregoing reasons, I conclude that the agency's decision to select removal as the appropriate penalty for Employee's infractions must be modified to a demotion.

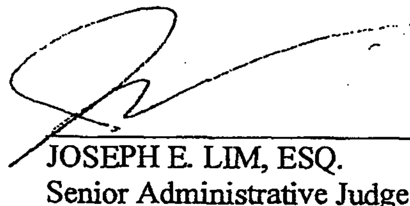
ORDER

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

1. Agency's action of terminating Employee is **REVERSED**; and

2. Agency shall reinstate and immediately demote Employee to the rank of lieutenant; reimburse her all back-pay and benefits lost as a result of her termination; and

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



JOSEPH E. LIM, ESQ.
Senior Administrative Judge

25 *See* MPD General Order 120.21. Attachment A: Table of Offenses and Penalties (April 13, 2006).

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.

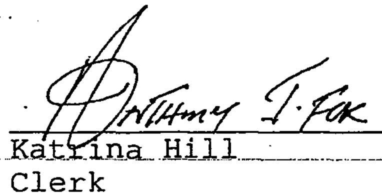
CERTIFICATE OF SERVICE

I certify that the attached **2ND INITIAL DECISION ON REMAND** was sent by regular mail on this day to:

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

Ted Williams, Esq.
1200 G Street, NW
Suite 800
Washington, DC 20005

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



Katrina Hill
Clerk

December 12, 2016
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

RECEIVED
Civil Clerk's Office
FEB 9 2018
Superior Court of the District of Columbia
Washington, D.C.

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

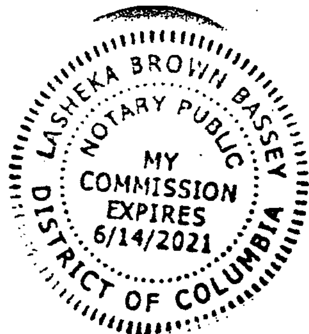
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT, Petitioner, v. D.C. OFFICE OF EMPLOYEE APPEALS, Respondent, PAULA EDMISTON, Intervenor.	Case No. 2017 CA 008130 P(MPA) Judge Elizabeth Wingo

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Paula Edmiston v. Metropolitan Police Department,* OEA Matter No. 1601-0057-07R16. The record consists of two volumes containing sixty-two (62) tabs.

Wynter Clarke
Paralegal Specialist



District of Columbia: SS
Subscribed and sworn to before me
this 9th day of February, 2018

Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

Filed
D.C. Superior Court
11/09/2018 14:33PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, Petitioner	Case No. 2017 CA 008130 P(MPA) Judge Elizabeth Wingo
v.	**Next Event: Status Hearing** Friday, November 16, 2018
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

Pursuant to the Hearing Notice that was entered on October 17, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Paula Edmiston v. Metropolitan Police Department* OEA Matter Number 1601-0057-07R16 (November 7, 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
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2018, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Frank J. McDougald
Counsel for Petitioner

Ted J. Williams
Counsel for Intervenor

Respectfully submitted,

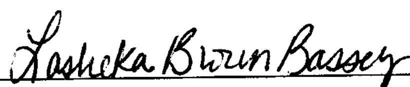


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Exhibit 1

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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:

PAULA EDMISTON,
Employee

v.

METROPOLITAN
POLICE DEPARTMENT,
Agency

OEA Matter No.: 1601-0057-07R16

Date of Issuance: November 7, 2017

OPINION AND ORDER
ON
REMAND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[13] *Employee's Brief on Remand in Response to the Superior Court's Decision* (November 14, 2016). Employee subsequently filed a Reply Brief to Agency's November 10, 2016 submission, wherein she argued that Agency's brief was non-responsive to the question presented by D.C. Superior Court in its Remand Order. In addition, Employee restated her position that MPD's General Order was inconsistent with DCMR § 1613.2. *Employee's Reply Brief* (December 1, 2016).
[14] *Second Initial Decision on Remand* (December 12, 2016).

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

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

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

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

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

<u>D.C. Superior Court's Instructions on Remand</u>

In his June 8, 2016, Order, the Honorable Judge Robert Okun remanded this matter to the AJ to specifically address the following question: "[d]id District of Columbia Regulation § 1613.2 prohibit *Chief Ramsey* from increasing Petitioner's penalty?" (emphasis added). According to Judge Okun, the AJ failed to address the issue of whether Agency's GO was superseded by the relevant DCMR regulation. He went on to state that "[t]he court finds nothing in the administrative record or the IDR to suggest that OEA concluded that General Order 120.21 granted Chief Ramsey the authority to act in a way prohibited by the municipal regulations of the District of Columbia."[16] As such, Agency's argument that the penalty of termination was actually recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett, is non responsive to the question presented on remand because it exceeds the purview of Judge Okun's instructions. Accordingly, D.C. Superior Court has already determined that the

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

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

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

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

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

---

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

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

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

L. Adverse Action Appeals

> (4) When an appeal is made, the appropriate papers shall be forwarded to the Chief of Police, who may affirm or modify the findings and/or the penalty imposed, remand the case to a previous step in the process, or remand the case for an alternative process, as he/she deems appropriate.
>
> (5) The Chief of Police *may impose a higher penalty than recommended* by the Hearing Tribunal, *or the Assistant Chief, OHS*. (emphasis added)

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

Duties and Responsibilities of the Proposing Official: General Discipline

> 1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.
>
> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, *but in no event shall he or she increase the penalty*. (emphasis added).

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

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

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

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

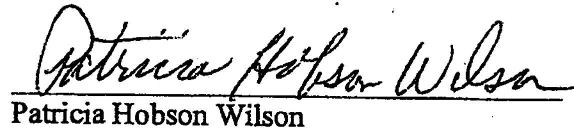
ORDER

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

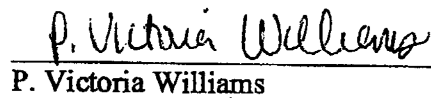
FOR THE BOARD:

Sheree L. Price, Chair

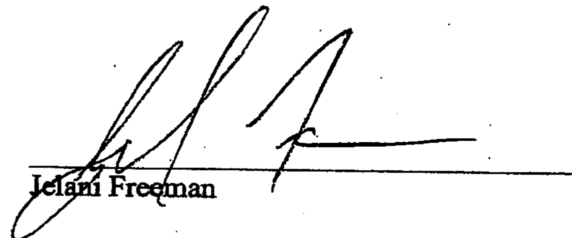
Vera M. Abbott



Patricia Hobson Wilson



P. Victoria Williams



Jelani Freeman

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

CERTIFICATE OF SERVICE

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

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

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

Ted Williams, Esq.
1200 G Street, NW
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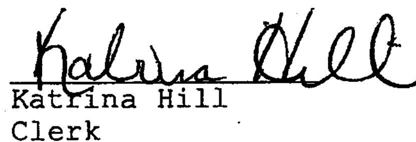
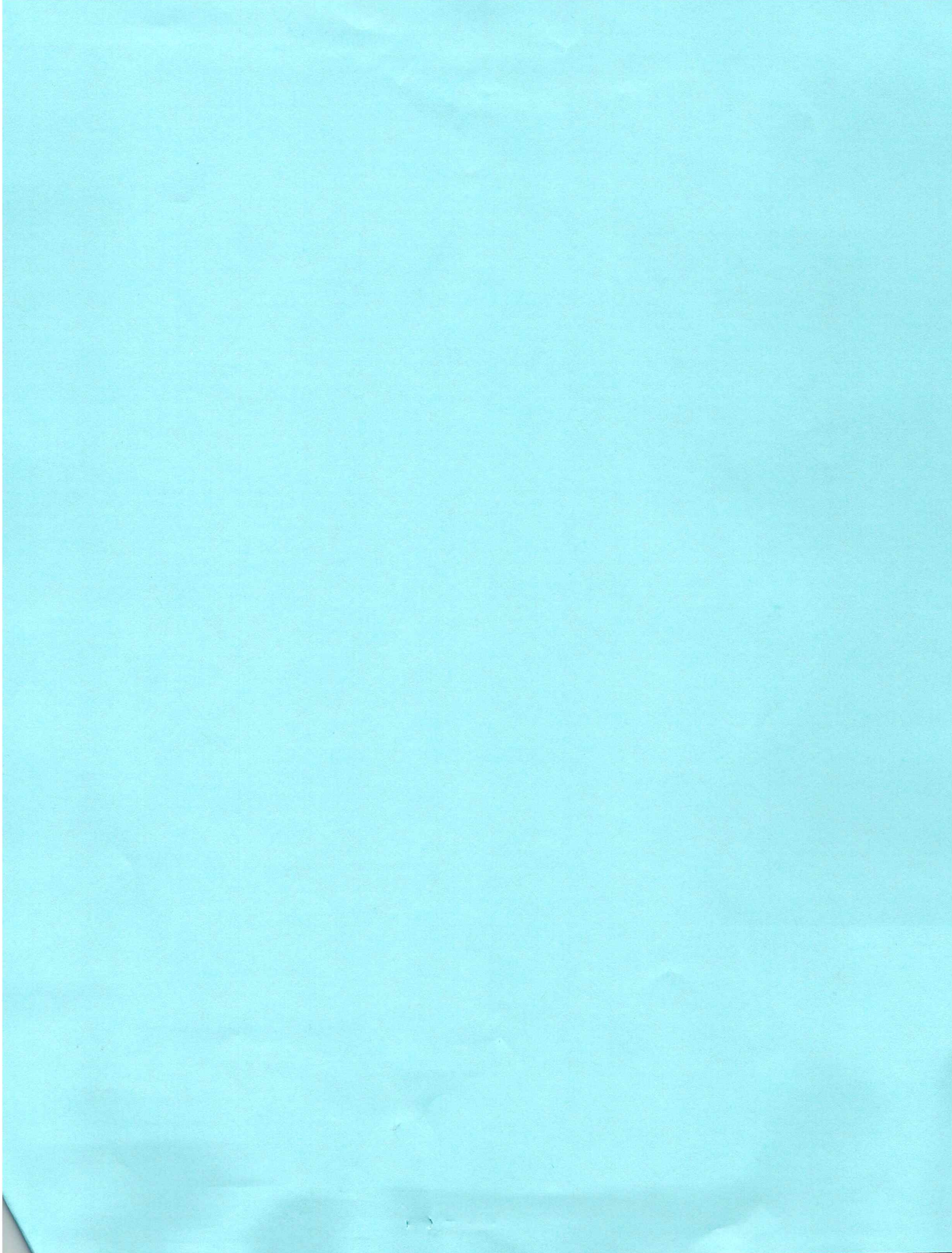
Washington, DC 20005

Marc L. Wilhite, Esq.
Pressler & Senftle
1432 K Street NW
12th Floor
Washington, DC 20005



Katrina Hill
Clerk

November 7, 2017
Date



Filed
D.C. Superior Court
08/11/2017 09:08AM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

In the matter of:	
GINA VAUGHN **2400 Honeystone Way** **Brookeville, MD 20833**	
Petitioner,	2017 CA 005525 P(MPA)
v.	
METROPOLITAN POLICE DEPARTMENT, **300 Indiana Avenue, NW, Room 4125** **Washington, DC 20001**	
and	
D.C. OFFICE OF EMPLOYEE APPEALS **1100 4th Street, SW, Suite 620 East** **Washington, DC 20024-4451**	
Respondents.	

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OFFICE OF EMPLOYEE APPEALS

PETITION FOR REVIEW OF AGENCY DECISION

Notice is hereby given that Petitioner Gina Vaughn, by and through counsel, appeals to the Superior Court of the District of Columbia from the Office of Employee Appeals ("OEA") Board Order issued on the 11th day of July, 2017. A copy of the Order sought to be reviewed is attached to this petition as Exhibit A.

Petitioner worked as a Computer Specialist with the District of Columbia Metropolitan Police Department (the "Agency") and was separated pursuant to a Reduction-in-Force ("RIF") on September 14, 2011. Ex. A at 1. On November 11, 2011, Petitioner filed a Petition for Appeal with the OEA, arguing that the RIF was not properly initiated, and the AJ ordered Petitioner be reinstated with backpay and benefits because there was a discrepancy between her RIF

notification competitive level and her official position of record, on December 11, 2014. Ex. A at 2. The Agency appealed the decision and the OEA Board remanded the decision on May 10, 2016 for the AJ to determine if the RIF discrepancy constituted a harmless error. *Id.* at 3. On September 9, 2016, the AJ acknowledged that there was an inconsistency in the RIF document as the Petitioner's duties and responsibilities were "significantly different duties of other Computer Specialist[s]" but still found the inconsistency to be harmless error. *Id.* at 5.

Petitioner was unable to contact her attorney after the AJ's September 9, 2016 decision and sent a letter to the OEA on October 18, 2016 explaining her attempts. *Id.* at 5-6. On October 27, 2016, Petitioner sent a second letter stating that her attorney abandoned her and requesting additional time to obtain a new attorney. *Id.* On December 19, 2016, Petitioner's attorney filed a memorandum in support of the Petitioner's initial letter and the Agency argued that the Petitioner's appeal was untimely. *Id.* On July 11, 2017, the OEA incorrectly held that the Petitioner's October 18, 2016 letter was not a Petition for Review and the OEA lacked authority to grant an extension to file Petitioner's extension. *Id.* at 10.

Petitioner hereby files this Petition for Review of the OEA's Opinion and Order on Remand issued on July 11, 2017, which found the Petitioner's October 18, 2016 letter was not a Petition for Review.

Address of Respondent Agency or Official:

D.C. Office of Employee Appeals
1100 4th Street, SW, Suite 620 East
Washington, DC 20024-4451

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

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August 2017 a copy of the foregoing was served on the following by first-class mail:

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

Sheree L. Price, Chair
D.C. Office of Employee Appeals
1100 4th St SW, Suite 620 East
Washington, DC 20024-4451

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

Respectfully submitted,

/s/ David A. Branch
David A. Branch

Exhibit A

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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: GINA VAUGHN, Employee v. METROPOLITAN POLICE DEPARTMENT, Agency	OEA Matter No.: 2401-0020-12R16 Date of Issuance: July 11, 2017

OPINION AND ORDER
ON REMAND

This case was previously before the Office of Employee Appeals' ("OEA") Board. Gina Vaughn ("Employee") worked as a Computer Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was October 14, 2011.

Employee filed a Petition for Appeal with the OEA on November 10, 2011. In her appeal, Employee argued that Agency improperly conducted the RIF because it was not initiated for the purpose of the budget, realignment, or reorganization as required under Title 6, § 2401 of the D.C. Municipal Regulations (D.C.M.R.).[1] She also stated that Agency failed to take steps to

[1] *Petition for Appeal* (November 10, 2011).

minimize the adverse impacts that the RIF would have on affected employees.[2] Agency filed its answer to the Petition for Appeal on December 13, 2011. It denied the allegations presented in Employee's appeal and requested that an evidentiary hearing be held.[3]

The AJ issued an Initial Decision ("ID") on December 11, 2014. He held that Employee's separation from service was based on inaccurate documents. Specifically, the AJ provided that at the time of the RIF, Employee's official position of record was a Computer Specialist, CS-334-12, Step 8. However, Agency's September 14, 2011 RIF notification listed her competitive level as DS-0034-12-10-N. Therefore, the AJ concluded that Employee was improperly separated from service from a position that she did not officially occupy. Consequently, Agency's RIF action was reversed, and Employee was ordered to be reinstated with back pay and benefits.[4]

Agency filed a Petition for Review with OEA's Board on January 15, 2015. It argued that the AJ should have afforded it an opportunity to provide a response regarding the discrepancies in Employee's RIF documents. According to Agency, Employee did not submit a brief or response brief as was directed in the AJ's October 22, 2014 order. Thus, it was unable to respond to any of Employee's arguments that were referenced by the AJ in his Initial Decision. Agency posited that if it had been given an opportunity to respond, it could have presented evidence to prove that any differences between the retention register and Employee's SF-50 constituted a harmless error. It further contended that the AJ's failure to allow a response to the "discrepancy issue" should result in the Initial Decision being reversed. In the alternative, Agency requested that the matter be remanded for further proceedings.[5]

---

[2] *Id.*
[3] *Agency Answer to Petition for Appeal*, p. 1 (December 13, 2011).
[4] *Initial Decision* (December 11, 2014). Employee's position of record on the SF-50 is listed as a DS-334-12, Step 8. The AJ incorrectly listed the position as a CS-0334-12.
[5] *Petition for Review* (January 15, 2015).

In response, Employee contended that the AJ correctly held that Agency committed a reversible error when it included her in the incorrect competitive level. According to Employee, Agency should have allowed her to compete in the DS-0334-12-10-N level, and not the DS-0334-12-07 level. Employee also posited that her termination was improper because the Administrative Order that authorized the RIF did not identify her position number as one that would be eliminated. Accordingly, she requested that the OEA Board uphold the Initial Decision. In the alternative, she asked that the matter be remanded to the AJ for the purpose of correcting the mistake of fact and to rule on the additional facts and evidence presented.[6]

The OEA Board issued its Opinion and Order on Petition for Review on May 10, 2016. It first provided that the AJ erred by not affording Agency an opportunity to address any of Employee's material allegations pertinent to the RIF. Of note, Agency was not given a chance to provide an explanation regarding the discrepancies and inaccuracies that the AJ used as a basis for reversing the RIF action. In addition, the Board determined that the AJ made a mistake of fact in finding that the "07" designation in Employee's Competitive Level DS-0334-12-07-N designation referred to a step in the pay scale grade instead of the actual position description. As a result, the matter was remanded to the AJ for further proceedings to determine whether Employee was placed in the correct competitive level and whether the inconsistencies in the RIF documents constituted a reversible error.[7]

On remand, the AJ ordered the parties to submit briefs addressing the issues enumerated in the Opinion and Order on Petition for Review.[8] Agency filed a Remand Brief in Support of Reduction-in-Force on July 29, 2016. It reiterated that Employee was placed in the correct

[6] *Opposition to Agency's Petition for Review* (February 19, 2015).
[7] *Opinion and Order on Petition for Review* (May 10, 2016).
[8] *Order Requesting Briefs* (May 27, 2016). The parties subsequently requested an extension of time in which to file briefs. The request was granted by the AJ and the deadline to submit briefs and optional response briefs was extended until August 23, 2016.

competitive level, Computer Specialist, DS-0334-12-07-N. Agency further clarified that the retention register it created included five factors/identifiers that represented Employee's competitive level, also known as a Competitive Level Code ("CLC"). Specifically, Agency provided that the CLC consisted of the pay plan; classification series of the position included on the retention register; grade level of the position; numerical designator for the position; and whether the position was supervisory or non-supervisory. Agency conceded that the documents of record reflected a slight discrepancy in Employee's CLC.[9] However, it opined that the differences did not constitute a reversible error. Thus, Agency argued that its RIF action should be upheld because Employee was separated from service in accordance with all applicable statutes and regulations.[10]

On August 1, 2016, Employee's former attorney, Leslie Deak, filed a Brief in Response to the Remand Order Opposing the RIF. She submitted that Employee's correct position at the time of the RIF was Computer Specialist, DS-0334-12-10-N, not DS-0334-12-07-N. Attorney Deak further stated that Agency's mistake constituted a reversible error because Employee was working under a position description that was designated for a competitive level different than the one in which she was placed. In addition, she contended that the Administrative Order did not include her position number as one to be eliminated under the RIF. Accordingly, attorney Deak reasoned that but for Agency's errors, Employee would not have been separated from service under the RIF. As a result, she asked that Agency's RIF action be reversed.[11]

Agency filed a Reply to Employee's Brief in Response to the Remand Order Opposing the RIF on August 19, 2016. It emphasized that the inconsistencies in the RIF documents

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[9] The CLC on Agency's retention register stated that Employee's position was Computer Specialist, DS-0334-12-07-N. Whereas, Employee's RIF notice reflected a position of DS-0334-12-10-N.
[10] *Agency's Remand Brief in Support of Reduction-in-Force* (July 29, 2016).
[11] *Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF* (August 1, 2016).

constituted a harmless error. Agency further stated that the position number on Employee's RIF documents was correctly listed as 00013015.[12]

The AJ issued his Initial Decision on Remand on September 9, 2016. He highlighted Chapter 6B, Section 2410.4 of the D.C. Municipal Regulations ("DCMR"), which provides that a competitive level shall encompass only those positions that are of the same grade and classification series and which are sufficiently alike in qualification requirements, duties, and responsibilities. According to the AJ, a competitive level is the grouping of positions with the same classification series and grade; whereas, the CLC is used to identify the positions that are in the group. Based on the evidence submitted by the parties, the AJ determined that Employee was placed in the correct competitive level. He further concluded that Employee's CLC at the time of the RIF was Computer Specialist, DS-0334-12-07-N, as the fourth identifier was a numerical designator for the position description that was established to differentiate her duties and responsibilities from the significantly different duties of other Computer Specialist (0334-12) positions. In addition, the AJ provided that the inconsistencies in the RIF documents constituted a harmless error because they did not significantly affect Agency's final decision to separate Employee from service. Therefore, the AJ reversed his previous ruling and upheld Agency's RIF action on remand.[13]

On October 18, 2016, Employee filed a Request for Extension of Time to File a Brief with OEA. In her request, Employee stated that she made several attempts to contact her attorney of record, Leslie Deak, to determine whether a brief was filed on her behalf concerning the

---

[12] *Agency's Reply to Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF* (August 19, 2016). Employee's attorney filed a Remand Reply Brief Opposing the RIF on August 23, 2013, wherein she reiterated her previous arguments concerning Agency's alleged harmful and reversible errors. Agency filed Errata on August 30, 2016 to correct a mistake on page 3 of its July 29, 2016, Remand Brief in Support of Reduction-in-Force.
[13] *Initial Decision on Remand* (September 9, 2016).

outstanding issues on remand. To avoid a dismissal of her appeal, Employee requested an additional week in which to file her brief.[14] On October 27, 2016, Employee filed a second letter titled "Abandonment by Attorney: Request for Leave to Obtain Attorney & Further [Extend Time] to File Brief-Memorandum on Pending Issues on Remand." Employee stated that she was unsuccessful in eliciting an update regarding the status of her pending appeal on remand from her attorney. Thus, she requested leave to find new counsel to represent her before OEA.[15]

On December 19, 2016, Employee's newly-retained attorney, Stephen Leckar, filed a Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision, wherein he asserts that Employee submitted a timely *pro se* letter to OEA after being abandoned by her previous attorney. According to attorney Leckar, the letter should be considered as a "nascent" Petition for Review. Additionally, he seeks leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included a fellow DS-12 Computer Specialist in her office who had significantly less seniority. Therefore, Employee's attorney requests leave to supplement the previously submitted letters and to explain why the AJ failed to address a dispositive matter of law that was timely raised before the AJ.[16]

In response, Agency argues that Employee's letter requesting an extension of time to file a brief on remand does not constitute a Petition for Review. It further states that the issue raised in Employee's Motion for Leave regarding the inclusion of another Computer Specialist in her competitive level was previously decided in the AJ's December 11, 2014 Initial Decision. As a result, Agency asks this Board to dismiss Employee's motion. Alternatively, it opines that if the

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[14] *Motion for Extension of Time to File Brief* (October 18, 2016).
[15] *Letter Requesting Leave to Obtain New Counsel* (October 27, 2016).
[16] *Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (December 19, 2016).

Board considers Employee's filing as a Petition for Review, her argument regarding the establishment of her competitive level should not be considered because the issue was already adjudicated by the AJ.[17]

The threshold issue to be decided by this Board is whether Employee's October 18, 2016 letter to OEA can be reasonably interpreted as a timely Petition for Review. OEA Rule 633.1 provides that a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. Under OEA Rule 607.4, filing of a petition for appeal and a petition for review must be made by personal delivery at the Office during normal business hours, Monday through Friday, or by mail addressed to the Office. In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

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

In this case, Employee's letter, titled "Request for Extension of Time to File Brief," stated the following in pertinent part:

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[17] *Agency's Opposition to Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (January 26, 2017). Employee filed a *Reply to Agency's Opposition to Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* on February 2, 2017, wherein she claims that she could have filed an appropriate petition with this Board if she had been made aware of the filing requirements by the AJ or OEA's Executive Director. Employee filed a Notice of Supplemental Authority on February 15, 2017.

> "Dear Ms. Barfield and Judge Lim. A month ago, the Office of Employee Appeals (OEA) Board remanded my appeal to Judge Lim for additional findings. Briefs on Remand were due to be filed with Judge Lim no later than today....
>
> I have made several attempts to contact my Attorney of Record, Ms. Leslie Deak, to determine whether her brief was filed today, the due date. I have been unsuccessful in reaching her today. As of this morning, checking with your Office Manager, there is no confirmation that she was filed with Judge Lim, any of the documents referenced in the order.
>
> *Thus, to avoid dismissal of my appeal...I am requesting that Judge Lim and the OEA grant a week's extension of the deadline to comply with the Order to brief the remaining issues in my case...."* (emphasis added).

This Board does not believe that Employee's letter was intended as a Petition for Review of the Initial Decision on Remand. Rather, Employee was attempting to determine whether her attorney filed a Brief on Remand in a timely manner. The language of Employee's letter was clear: to request an extension of time to file a brief to avoid dismissal of her appeal. Contrary to Employee's argument, there is no indication that this submission was meant to serve as a *pro se* Petition for Review, as the letter made no reference to the Initial Decision on Remand and provided no basis for granting a petition as provided in OEA Rule 633.3. Moreover, Employee provides no credible basis to support a finding that the AJ and/or OEA's Executive Director were required to inform her of the need to file a Petition for Review after being apprised of Employee's "plight."[18] Accordingly, we are unpersuaded by Employee's argument that her letter to OEA constituted a Petition for Review.

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[18] It should be noted that Employee's previous attorney, Leslie Deak, submitted a Brief in Response to the Remand Order Opposing the RIF on August 1, 2016 and a Remand Reply Brief Opposing the RIF on August 23, 2016. While it is unfortunate that she failed to communicate with Employee regarding the status of the remand and the filing deadlines, the record shows that attorney Deak adequately adhered to the AJ's briefing schedule. Accordingly, Employee was in compliance with the AJ's Order on Remand.

Even if we were to unreasonably construe Employee's letter as a Petition for Review, it was nonetheless filed in an untimely manner. Under OEA Rule 633.1, Employee was required to file a Petition for Review within thirty-five calendar days of the issuance date of the Initial Decision on Remand. The petition could not be submitted via email or facsimile.[19] Thus, when OEA received Employee's letter via U.S. Mail on October 18, 2016, the thirty-five day period had passed. Furthermore, D.C. Official Code § 1-606.03(c) provides that "...the initial decision...shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." The D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991), that "the time limits for filing appeals with administrative agencies, as with courts, are mandatory and jurisdictional matters." Therefore, OEA has consistently held that the Petition for Review filing requirement is mandatory in nature.[20]

Lastly, Employee's current attorney has filed a Motion for Leave to Submit a Memorandum in Support of Petition for Review of Initial Decision. He requests leave to supplement Employee's letter and explain why the AJ failed to address a dispositive matter that was raised on Petition for Appeal. However, in *Shalonda Smith v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0195-11, *Opinion and Order on Petition for Review* (March 3, 2015), this Board held that it lacks the authority to grant any requests for

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[19] *See* OEA Rule 607.4 *supra*.
[20] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Dametrius McKenny v. D.C. Public Schools*, OEA Matter No. 1601-0207-12, *Opinion and Order on Petition for Review* (February 16, 2016); and *Carolyn Reynolds v. D.C. Public Schools*, OEA Matter No. 1601-0133-11, *Opinion and Order on Petition for Review* (May 10, 2016).

extensions for filing Petitions for Review. While Employee's attorney attempts to distinguish the facts in ***Smith*** from those in the instant matter, the premise the same. There are no rules or regulations which bestow on this Board the ability to rule on motions for extensions. Furthermore, Employee fails to provide a credible legal basis to support her position that this Board has the authority to grant a motion for an extension of time in which to file a Petition for Review. As a result, her motion must be denied.[21]

Based on the foregoing, this Board does not interpret Employee's October 18, 2016 letter to be a Petition for Review. In addition, we lack the authority to grant a request for an extension of time in which to file a Petition for Review. Consequently, Employee's Motion for Leave to Submit a Memorandum in Support of Petition for Review of Initial Decision must be denied.

---

[21] Employee's attorney seeks leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included another DS-12 Computer Specialist who had significantly less seniority. However, the AJ addressed this issue in his December 11, 2014 Initial Decision. Employee argued that Agency violated District Personnel Manual Section 2423.1(b) when it included only Computer Specialist, Zach Gamble, and not Karim Alaoul, and the vacant Grade 12 Information Technology Specialist positions, in her competitive level. Specifically, Employee alleged that she should have been allowed to compete for the Grade 12 Information Technology Specialist position held by Karimi Alaoul, as well as four vacant positions. The AJ held that Employee failed to provide any evidence regarding Karimi Alaoul's position of record to prove that he should have been included in her competitive level. In addition, the AJ provided that Employee failed to cite to any statute, regulation, or rule to bolster her contention that even vacant positions should be included in the establishment of a competitive level. Thus, pursuant to OEA Rule 632.1, the AJ's previous ruling regarding whether Employee's competitive level was correctly established became final thirty-five days after the issuance of the Initial Decision.

ORDER

Accordingly, it is hereby ordered that Employee's filing is **DENIED**.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

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

CERTIFICATE OF SERVICE

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

Gina Vaughn
2400 Honeystone Way
Brookeville, MD 20833

Frank McDougald, Esq.
Office of the Attorney General
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Washington, DC 20001

Stephen C. Leckar, Esq.
Shainis & Peltzman, Chtd..
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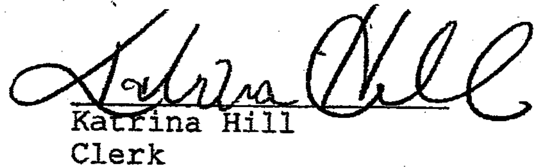


Katrina Hill
Clerk

July 11, 2017
Date

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

FILED
CIVIL ACTIONS BRANCH
SEP 26 2017
Superior Court
of the District of Columbia
Washington, D.C.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

GINA VAUGHN,
Petitioner,

v.

METROPOLITAN POLICE DEPARTMENT et al.,
Respondent,

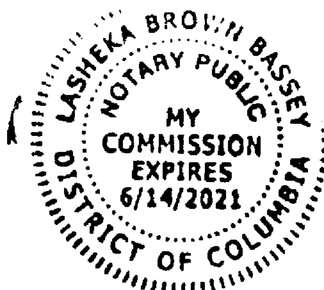
Case No. 2017 CA 005525 P(MPA)

Judge William M. Jackson

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Gina Vaughn v. Metropolitan Police Department,* OEA Matter No. 2401-0020-12R16. The record consists of two volumes containing sixty-one (61) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist



District of Columbia: SS
Subscribed and Sworn to before me
this 25th day of September, 2017
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

Filed
D.C. Superior Court
11/09/2018 12:01PM
Clerk of the Court

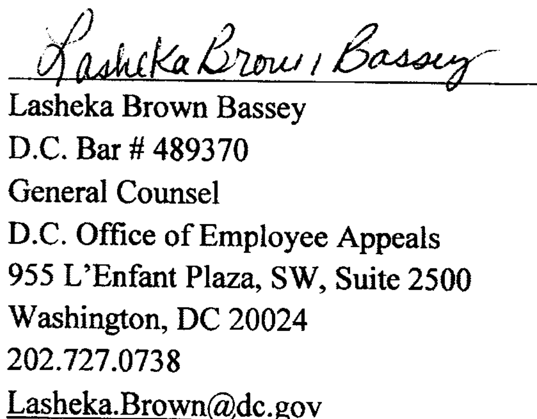
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

GINA VAUGHN, Petitioner v. METROPOLITAN POLICE DEPARTMENT, et al., Respondents.	Case No. 2017 CA 005525 P(MPA) Judge William M. Jackson **Next Event: Status Hearing November 9, 2018 at 9:30 a.m.**

OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Notice of Hearing that was entered on September 7, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Gina Vaughn v. Metropolitan Police Department*, OEA Matter Number 2401-0020-12R16 (July 11, 2017), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,



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

I hereby certify that on this 9th day of November, 2018, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Andrea G. Comentale
Counsel for Respondent

David A. Branch
Louise E. Ryder
Counsels for Petitioner

Respectfully submitted,

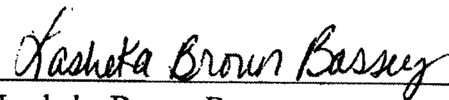

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Exhibit 1

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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GINA VAUGHN,	)	
Employee	)	
	)	OEA Matter No.: 2401-0020-12R16
v.	)	
	)	Date of Issuance: July 11, 2017
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON REMAND

This case was previously before the Office of Employee Appeals' ("OEA") Board. Gina Vaughn ("Employee") worked as a Computer Specialist with the Metropolitan Police Department ("Agency"). On September 14, 2011, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was October 14, 2011.

Employee filed a Petition for Appeal with the OEA on November 10, 2011. In her appeal, Employee argued that Agency improperly conducted the RIF because it was not initiated for the purpose of the budget, realignment, or reorganization as required under Title 6, § 2401 of the D.C. Municipal Regulations (D.C.M.R.).[1] She also stated that Agency failed to take steps to

[1] *Petition for Appeal* (November 10, 2011).

minimize the adverse impacts that the RIF would have on affected employees.[2] Agency filed its answer to the Petition for Appeal on December 13, 2011. It denied the allegations presented in Employee's appeal and requested that an evidentiary hearing be held.[3]

The AJ issued an Initial Decision ("ID") on December 11, 2014. He held that Employee's separation from service was based on inaccurate documents. Specifically, the AJ provided that at the time of the RIF, Employee's official position of record was a Computer Specialist, CS-334-12, Step 8. However, Agency's September 14, 2011 RIF notification listed her competitive level as DS-0034-12-10-N. Therefore, the AJ concluded that Employee was improperly separated from service from a position that she did not officially occupy. Consequently, Agency's RIF action was reversed, and Employee was ordered to be reinstated with back pay and benefits.[4]

Agency filed a Petition for Review with OEA's Board on January 15, 2015. It argued that the AJ should have afforded it an opportunity to provide a response regarding the discrepancies in Employee's RIF documents. According to Agency, Employee did not submit a brief or response brief as was directed in the AJ's October 22, 2014 order. Thus, it was unable to respond to any of Employee's arguments that were referenced by the AJ in his Initial Decision. Agency posited that if it had been given an opportunity to respond, it could have presented evidence to prove that any differences between the retention register and Employee's SF-50 constituted a harmless error. It further contended that the AJ's failure to allow a response to the "discrepancy issue" should result in the Initial Decision being reversed. In the alternative, Agency requested that the matter be remanded for further proceedings.[5]

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[2] *Id.*
[3] *Agency Answer to Petition for Appeal*, p. 1 (December 13, 2011).
[4] *Initial Decision* (December 11, 2014). Employee's position of record on the SF-50 is listed as a DS-334-12, Step 8. The AJ incorrectly listed the position as a CS-0334-12.
[5] *Petition for Review* (January 15, 2015).

In response, Employee contended that the AJ correctly held that Agency committed a reversible error when it included her in the incorrect competitive level. According to Employee, Agency should have allowed her to compete in the DS-0334-12-10-N level, and not the DS-0334-12-07 level. Employee also posited that her termination was improper because the Administrative Order that authorized the RIF did not identify her position number as one that would be eliminated. Accordingly, she requested that the OEA Board uphold the Initial Decision. In the alternative, she asked that the matter be remanded to the AJ for the purpose of correcting the mistake of fact and to rule on the additional facts and evidence presented.[6]

The OEA Board issued its Opinion and Order on Petition for Review on May 10, 2016. It first provided that the AJ erred by not affording Agency an opportunity to address any of Employee's material allegations pertinent to the RIF. Of note, Agency was not given a chance to provide an explanation regarding the discrepancies and inaccuracies that the AJ used as a basis for reversing the RIF action. In addition, the Board determined that the AJ made a mistake of fact in finding that the "07" designation in Employee's Competitive Level DS-0334-12-07-N designation referred to a step in the pay scale grade instead of the actual position description. As a result, the matter was remanded to the AJ for further proceedings to determine whether Employee was placed in the correct competitive level and whether the inconsistencies in the RIF documents constituted a reversible error.[7]

On remand, the AJ ordered the parties to submit briefs addressing the issues enumerated in the Opinion and Order on Petition for Review.[8] Agency filed a Remand Brief in Support of Reduction-in-Force on July 29, 2016. It reiterated that Employee was placed in the correct

---

[6] *Opposition to Agency's Petition for Review* (February 19, 2015).
[7] *Opinion and Order on Petition for Review* (May 10, 2016).
[8] *Order Requesting Briefs* (May 27, 2016). The parties subsequently requested an extension of time in which to file briefs. The request was granted by the AJ and the deadline to submit briefs and optional response briefs was extended until August 23, 2016.

competitive level, Computer Specialist, DS-0334-12-07-N. Agency further clarified that the retention register it created included five factors/identifiers that represented Employee's competitive level, also known as a Competitive Level Code ("CLC"). Specifically, Agency provided that the CLC consisted of the pay plan; classification series of the position included on the retention register; grade level of the position; numerical designator for the position; and whether the position was supervisory or non-supervisory. Agency conceded that the documents of record reflected a slight discrepancy in Employee's CLC.[9] However, it opined that the differences did not constitute a reversible error. Thus, Agency argued that its RIF action should be upheld because Employee was separated from service in accordance with all applicable statutes and regulations.[10]

On August 1, 2016, Employee's former attorney, Leslie Deak, filed a Brief in Response to the Remand Order Opposing the RIF. She submitted that Employee's correct position at the time of the RIF was Computer Specialist, DS-0334-12-10-N, not DS-0334-12-07-N. Attorney Deak further stated that Agency's mistake constituted a reversible error because Employee was working under a position description that was designated for a competitive level different than the one in which she was placed. In addition, she contended that the Administrative Order did not include her position number as one to be eliminated under the RIF. Accordingly, attorney Deak reasoned that but for Agency's errors, Employee would not have been separated from service under the RIF. As a result, she asked that Agency's RIF action be reversed.[11]

Agency filed a Reply to Employee's Brief in Response to the Remand Order Opposing the RIF on August 19, 2016. It emphasized that the inconsistencies in the RIF documents

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[9] The CLC on Agency's retention register stated that Employee's position was Computer Specialist, DS-0334-12-07-N. Whereas, Employee's RIF notice reflected a position of DS-0334-12-10-N.
[10] *Agency's Remand Brief in Support of Reduction-in-Force* (July 29, 2016).
[11] *Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF* (August 1, 2016).

constituted a harmless error. Agency further stated that the position number on Employee's RIF documents was correctly listed as 00013015.[12]

The AJ issued his Initial Decision on Remand on September 9, 2016. He highlighted Chapter 6B, Section 2410.4 of the D.C. Municipal Regulations ("DCMR"), which provides that a competitive level shall encompass only those positions that are of the same grade and classification series and which are sufficiently alike in qualification requirements, duties, and responsibilities. According to the AJ, a competitive level is the grouping of positions with the same classification series and grade; whereas, the CLC is used to identify the positions that are in the group. Based on the evidence submitted by the parties, the AJ determined that Employee was placed in the correct competitive level. He further concluded that Employee's CLC at the time of the RIF was Computer Specialist, DS-0334-12-07-N, as the fourth identifier was a numerical designator for the position description that was established to differentiate her duties and responsibilities from the significantly different duties of other Computer Specialist (0334-12) positions. In addition, the AJ provided that the inconsistencies in the RIF documents constituted a harmless error because they did not significantly affect Agency's final decision to separate Employee from service. Therefore, the AJ reversed his previous ruling and upheld Agency's RIF action on remand.[13]

On October 18, 2016, Employee filed a Request for Extension of Time to File a Brief with OEA. In her request, Employee stated that she made several attempts to contact her attorney of record, Leslie Deak, to determine whether a brief was filed on her behalf concerning the

---

[12] *Agency's Reply to Employee Vaughn's Brief in Response to the Remand Order Opposing the RIF* (August 19, 2016). Employee's attorney filed a Remand Reply Brief Opposing the RIF on August 23, 2013, wherein she reiterated her previous arguments concerning Agency's alleged harmful and reversible errors. Agency filed Errata on August 30, 2016 to correct a mistake on page 3 of its July 29, 2016, Remand Brief in Support of Reduction-in-Force.

[13] *Initial Decision on Remand* (September 9, 2016).

outstanding issues on remand. To avoid a dismissal of her appeal, Employee requested an additional week in which to file her brief.[14] On October 27, 2016, Employee filed a second letter titled "Abandonment by Attorney: Request for Leave to Obtain Attorney & Further [Extend Time] to File Brief-Memorandum on Pending Issues on Remand." Employee stated that she was unsuccessful in eliciting an update regarding the status of her pending appeal on remand from her attorney. Thus, she requested leave to find new counsel to represent her before OEA.[15]

On December 19, 2016, Employee's newly-retained attorney, Stephen Leckar, filed a Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision, wherein he asserts that Employee submitted a timely *pro se* letter to OEA after being abandoned by her previous attorney. According to attorney Leckar, the letter should be considered as a "nascent" Petition for Review. Additionally, he seeks leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included a fellow DS-12 Computer Specialist in her office who had significantly less seniority. Therefore, Employee's attorney requests leave to supplement the previously submitted letters and to explain why the AJ failed to address a dispositive matter of law that was timely raised before the AJ.[16]

In response, Agency argues that Employee's letter requesting an extension of time to file a brief on remand does not constitute a Petition for Review. It further states that the issue raised in Employee's Motion for Leave regarding the inclusion of another Computer Specialist in her competitive level was previously decided in the AJ's December 11, 2014 Initial Decision. As a result, Agency asks this Board to dismiss Employee's motion. Alternatively, it opines that if the

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[14] *Motion for Extension of Time to File Brief* (October 18, 2016).
[15] *Letter Requesting Leave to Obtain New Counsel* (October 27, 2016).
[16] *Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (December 19, 2016).

Board considers Employee's filing as a Petition for Review, her argument regarding the establishment of her competitive level should not be considered because the issue was already adjudicated by the AJ.[17]

The threshold issue to be decided by this Board is whether Employee's October 18, 2016 letter to OEA can be reasonably interpreted as a timely Petition for Review. OEA Rule 633.1 provides that a party wishing to file a Petition for Review with OEA must do so within thirty-five calendar days, including holidays and weekends, of the issuance date of the Initial Decision. Under OEA Rule 607.4, filing of a petition for appeal and a petition for review must be made by personal delivery at the Office during normal business hours, Monday through Friday, or by mail addressed to the Office. In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

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

In this case, Employee's letter, titled "Request for Extension of Time to File Brief," stated the following in pertinent part:

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[17] *Agency's Opposition to Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* (January 26, 2017). Employee filed a *Reply to Agency's Opposition to Motion for Leave to Submit Memorandum in Support of Petition for Review of Initial Decision* on February 2, 2017, wherein she claims that she could have filed an appropriate petition with this Board if she had been made aware of the filing requirements by the AJ or OEA's Executive Director. Employee filed a Notice of Supplemental Authority on February 15, 2017.

> "Dear Ms. Barfield and Judge Lim. A month ago, the Office of Employee Appeals (OEA) Board remanded my appeal to Judge Lim for additional findings. Briefs on Remand were due to be filed with Judge Lim no later than today....
>
> I have made several attempts to contact my Attorney of Record, Ms. Leslie Deak, to determine whether her brief was filed today, the due date. I have been unsuccessful in reaching her today. As of this morning, checking with your Office Manager, there is no confirmation that she was filed with Judge Lim, any of the documents referenced in the order.
>
> *Thus, to avoid dismissal of my appeal...I am requesting that Judge Lim and the OEA grant a week's extension of the deadline to comply with the Order to brief the remaining issues in my case...."* (emphasis added).

This Board does not believe that Employee's letter was intended as a Petition for Review of the Initial Decision on Remand. Rather, Employee was attempting to determine whether her attorney filed a Brief on Remand in a timely manner. The language of Employee's letter was clear: to request an extension of time to file a brief to avoid dismissal of her appeal. Contrary to Employee's argument, there is no indication that this submission was meant to serve as a *pro se* Petition for Review, as the letter made no reference to the Initial Decision on Remand and provided no basis for granting a petition as provided in OEA Rule 633.3. Moreover, Employee provides no credible basis to support a finding that the AJ and/or OEA's Executive Director were required to inform her of the need to file a Petition for Review after being apprised of Employee's "plight."[18] Accordingly, we are unpersuaded by Employee's argument that her letter to OEA constituted a Petition for Review.

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[18] It should be noted that Employee's previous attorney, Leslie Deak, submitted a Brief in Response to the Remand Order Opposing the RIF on August 1, 2016 and a Remand Reply Brief Opposing the RIF on August 23, 2016. While it is unfortunate that she failed to communicate with Employee regarding the status of the remand and the filing deadlines, the record shows that attorney Deak adequately adhered to the AJ's briefing schedule. Accordingly, Employee was in compliance with the AJ's Order on Remand.

Even if we were to unreasonably construe Employee's letter as a Petition for Review, it was nonetheless filed in an untimely manner. Under OEA Rule 633.1, Employee was required to file a Petition for Review within thirty-five calendar days of the issuance date of the Initial Decision on Remand. The petition could not be submitted via email or facsimile.[19] Thus, when OEA received Employee's letter via U.S. Mail on October 18, 2016, the thirty-five day period had passed. Furthermore, D.C. Official Code § 1-606.03(c) provides that "...the initial decision...shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." The D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991), that "the time limits for filing appeals with administrative agencies, as with courts, are mandatory and jurisdictional matters." Therefore, OEA has consistently held that the Petition for Review filing requirement is mandatory in nature.[20]

Lastly, Employee's current attorney has filed a Motion for Leave to Submit a Memorandum in Support of Petition for Review of Initial Decision. He requests leave to supplement Employee's letter and explain why the AJ failed to address a dispositive matter that was raised on Petition for Appeal. However, in *Shalonda Smith v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0195-11, *Opinion and Order on Petition for Review* (March 3, 2015), this Board held that it lacks the authority to grant any requests for

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[19] *See* OEA Rule 607.4 *supra*.

[20] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010); *Dametrius McKenny v. D.C. Public Schools*, OEA Matter No. 1601-0207-12, *Opinion and Order on Petition for Review* (February 16, 2016); and *Carolyn Reynolds v. D.C. Public Schools*, OEA Matter No. 1601-0133-11, *Opinion and Order on Petition for Review* (May 10, 2016).

extensions for filing Petitions for Review. While Employee's attorney attempts to distinguish the facts in ***Smith*** from those in the instant matter, the premise the same. There are no rules or regulations which bestow on this Board the ability to rule on motions for extensions. Furthermore, Employee fails to provide a credible legal basis to support her position that this Board has the authority to grant a motion for an extension of time in which to file a Petition for Review. As a result, her motion must be denied.[21]

Based on the foregoing, this Board does not interpret Employee's October 18, 2016 letter to be a Petition for Review. In addition, we lack the authority to grant a request for an extension of time in which to file a Petition for Review. Consequently, Employee's Motion for Leave to Submit a Memorandum in Support of Petition for Review of Initial Decision must be denied.

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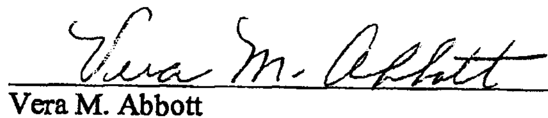
[21] Employee's attorney seeks leave to submit a brief in support of Employee's argument that the AJ failed to address her claim that her competitive level should have included another DS-12 Computer Specialist who had significantly less seniority. However, the AJ addressed this issue in his December 11, 2014 Initial Decision. Employee argued that Agency violated District Personnel Manual Section 2423.1(b) when it included only Computer Specialist, Zach Gamble, and not Karim Alaoul, and the vacant Grade 12 Information Technology Specialist positions, in her competitive level. Specifically, Employee alleged that she should have been allowed to compete for the Grade 12 Information Technology Specialist position held by Karimi Alaoul, as well as four vacant positions. The AJ held that Employee failed to provide any evidence regarding Karimi Alaoul's position of record to prove that he should have been included in her competitive level. In addition, the AJ provided that Employee failed to cite to any statute, regulation, or rule to bolster her contention that even vacant positions should be included in the establishment of a competitive level. Thus, pursuant to OEA Rule 632.1, the AJ's previous ruling regarding whether Employee's competitive level was correctly established became final thirty-five days after the issuance of the Initial Decision.

ORDER

Accordingly, it is hereby ordered that Employee's filing is **DENIED**.

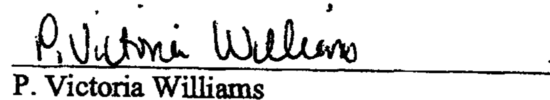
FOR THE BOARD:

Sheree L. Price, Chair



Vera M. Abbott

Patricia Hobson Wilson



P. Victoria Williams

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

CERTIFICATE OF SERVICE

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

Gina Vaughn
2400 Honeystone Way
Brookeville, MD 20833

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Stephen C. Leckar, Esq.
Shainis & Peltzman, Chtd..
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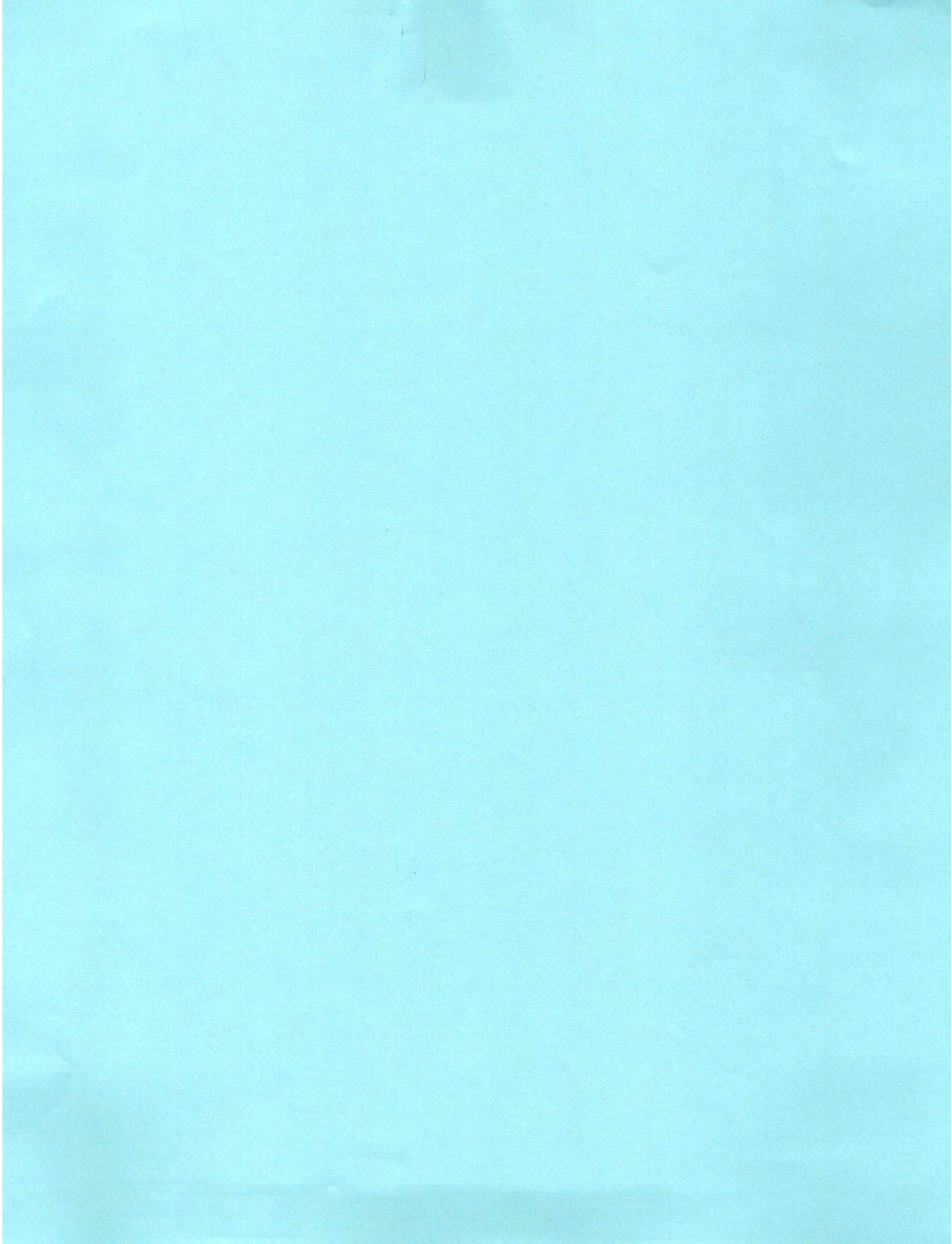
Katrina Hill
Clerk

July 11, 2017
Date



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

In the matter of:

PHILLIPPA MEZILE,
2020 12th Street, NW, Apt. 416
Washington, DC 20009

Petitioner,

v.

D.C. DEPARTMENT ON DISABILITY SERVICES,
250 E Street, SW
Washington, DC 20024

and

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

Respondents.

RECEIVED
2018 APR 23 PM 3:33
OFFICE OF EMPLOYEE APPEALS

PETITION FOR REVIEW OF AGENCY DECISION

Notice is hereby given that Petitioner Phillippa Mezile ("Petitioner Mezile"), by and through counsel, appeals to the Superior Court of the District of Columbia from the District of Columbia Office of Employee Appeals ("OEA") Board Opinion and Order on Petition for Review issued on the 22nd day of March, 2018. A copy of the Order sought to be reviewed is attached to this petition as Exhibit A.

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

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

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

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

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

Address of Respondent Agencies or Officials:

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

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

Names and addresses of parties or attorneys to be served:

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Section Chief
Personnel and Labor Relations Section
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Sheree L. Price, Chair

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Respectfully submitted,

/s/ David A. Branch
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2018 a copy of the foregoing was served on the following by first-class mail:

Karl A. Racine
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Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
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Washington, DC 20024

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

Respectfully submitted,

/s/ David A. Branch
David A. Branch

Exhibit A

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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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

OPINION AND ORDER
ON
PETITION FOR REVIEW

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

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

and regulations.[2]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[8] *Agency's Response to Employee's Request for Compliance* (December 12, 2016). On January 4, 2017, Agency filed with OEA a Report on Compliance, stating that a check was issued to Employee on December 13, 2016, in the after-tax amount of $1,153.43. Agency attached a copy of the paystub to its submission.
[9] *Addendum Decision on Compliance* (January 6, 2017).
[10] *Employee's Petition for Attorneys' Fees and Costs* (February 6, 2017).
[11] *Agency's Final Response to Employee's Petition for Attorneys' Fees and Costs* (March 31, 2017).

benefits. While Employee did not receive the total relief that she sought because Agency's RIF action was ultimately upheld, she did receive an award of four days' worth of back pay and benefits because of Agency's failure to provide adequate notice of the RIF. Thus, the AJ opined that Employee obtained "an actual, if nominal, relief on the merit[s] of her claim that she was not given the full thirty-day notice required by law." He further stated that Agency's failure to comply with the notice requirements altered the legal relationship between the parties because Employee received some form of direct benefit.

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

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

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

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

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

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[15] Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

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[13] *Petition for Review of Addendum Decision on Attorney Fees* (July 19, 2017)
[14] *Agency's Response to Employee's Petition for Review* (August 23, 2017).
[15] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Prevailing Party

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

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

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[16] *See* OEA Rule 634.

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

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

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

Interest of Justice

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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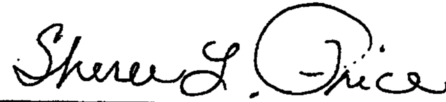
[26] *See* DPM 2405.7, 47 D.C. Reg. 2430 (2000). This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."

ORDER

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

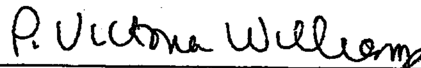
FOR THE BOARD:



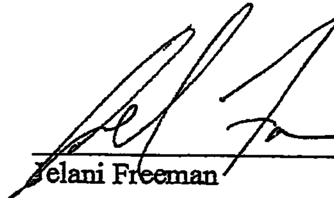
Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson



P. Victoria Williams



Jelani Freeman

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

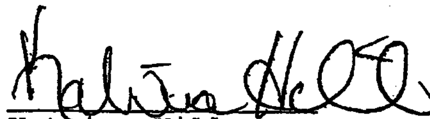
CERTIFICATE OF SERVICE

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

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

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

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



Katrina Hill
Clerk

March 22, 2018
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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

FILED
CIVIL ACTIONS BRANCH
JUN 15 2018
Superior Court
of the District of Columbia
Washington, D.C.

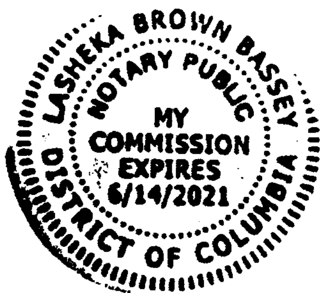
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

CERTIFICATE OF FILING

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

Wynter Clarke
Wynter Clarke
Paralegal Specialist



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

Filed
D.C. Superior Court
11/16/2018 15:27PM
Clerk of the Court

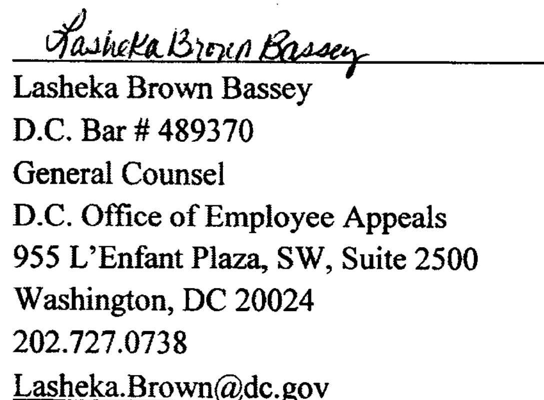
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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

OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

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

Respectfully submitted



Lasheka Brown Bassey
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General Counsel
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955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
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Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

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

Charles Frye
Counsel for Respondent

David A. Branch
Counsel for Petitioner

Respectfully submitted,

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
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Exhibit 1

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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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

OPINION AND ORDER
ON
PETITION FOR REVIEW

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

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

and regulations.[2]

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

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[2] *Agency's Answer to Petition for Appeal* (August 13, 2009).
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the matter was remanded to the AJ for further consideration.[5]

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

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

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

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

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

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

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

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

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

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

[8] *Agency's Response to Employee's Request for Compliance* (December 12, 2016). On January 4, 2017, Agency filed with OEA a Report on Compliance, stating that a check was issued to Employee on December 13, 2016, in the after-tax amount of $1,153.43. Agency attached a copy of the paystub to its submission.
[9] *Addendum Decision on Compliance* (January 6, 2017).
[10] *Employee's Petition for Attorneys' Fees and Costs* (February 6, 2017).
[11] *Agency's Final Response to Employee's Petition for Attorneys' Fees and Costs* (March 31, 2017).

benefits. While Employee did not receive the total relief that she sought because Agency's RIF action was ultimately upheld, she did receive an award of four days' worth of back pay and benefits because of Agency's failure to provide adequate notice of the RIF. Thus, the AJ opined that Employee obtained "an actual, if nominal, relief on the merit[s] of her claim that she was not given the full thirty-day notice required by law." He further stated that Agency's failure to comply with the notice requirements altered the legal relationship between the parties because Employee received some form of direct benefit.

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

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

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

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

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

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[15] Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

[13] *Petition for Review of Addendum Decision on Attorney Fees* (July 19, 2017)
[14] *Agency's Response to Employee's Petition for Review* (August 23, 2017).
[15] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Prevailing Party

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

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

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

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

Interest of Justice

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

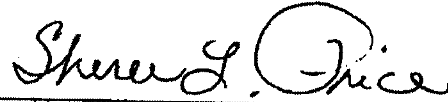
Jelani Freeman

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

ORDER

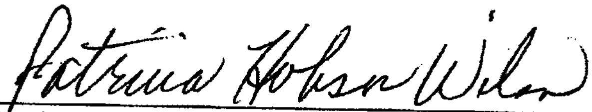
Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

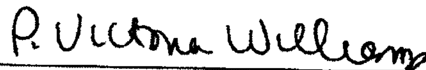


Sheree L. Price, Chair

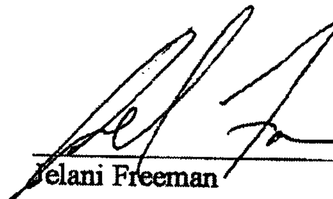
Vera M. Abbott



Patricia Hobson Wilson



P. Victoria Williams



Jelani Freeman

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CERTIFICATE OF SERVICE

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

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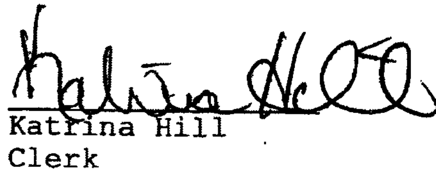

Katrina Hill
Clerk

March 22, 2018
Date