ATTACHMENT #1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser

Office of the City Administrator

January 15, 2021

Fiscal Year (FY) 2020 was an unprecedented year for all DC residents, businesses and the District Government. In March 2020—the second quarter of the fiscal year—Mayor Bowser declared a public health emergency and District government quickly pivoted to respond to the COVID-19 global health pandemic. To align with recommended social distancing and public safety guidelines, in just one day, over 60 percent of District government employees transitioned to a telework posture. In addition, many District agencies limited or temporarily ceased most in-person activities and services.

The global health emergency required the District to significantly reallocate financial and personnel resources to respond to the pandemic. With the change in operations and a substantial decrease in revenues, the District's response required all agencies to determine how to best provide services to District residents, visitors and employees, while maintaining the necessary protocols to help slow the spread of COVID-19.

As such, the global health pandemic greatly impacted some agencies' abilities to meet their FY20 key performance indicators (KPIs) and strategic initiatives established prior to its onset as agencies shifted resources to respond to COVID-19. Therefore, outcomes for KPIs and strategic initiatives reflect a shift in District priorities and efforts during this crisis. While we continue to believe strongly in performance tracking to improve District services, the data for FY20 is not fully indicative of agencies' performance and should be reviewed factoring in the unprecedented challenges encountered in FY 2020.

Sincerely,

Kevin Donahue
Interim City Administrator

Office of Employee Appeals FY2020

Agency Office of Employee Appeals **Agency Code** CH0 **Fiscal Year** 2020

Mission The Office of Employee Appeals (OEA) is an independent agency with a mission is to adjudicate employee appeals and rendering impartial decisions with sound legal reasoning in a timely manner.

Summary of Services In accordance with DC Official Code Â§1-606.03, the Office of Employee Appeals adjudicates the several types of personnel actions. (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

2020 Accomplishments

Accomplishment	Impact on Agency	Impact on Residents
No accomplishments found		

2020 Key Performance Indicators

Measure	Frequency	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Quarter 1	FY 2020 Quarter 2	FY 2020 Quarter 3	FY 2020 Quarter 4	FY 2020 Actual	KPI Status	Explanation for Unmet FY 2020 Target
1 - Render impartial, legally sound decisions in a timely manner. (6 Measures)												
Number of Opinions and Orders Issued	Quarterly	51	33	19	25	6	4	8	0	18	Unmet	Because the agency had its budget reduced toward the end of the fiscal year due to the pandemic, this prevented the Board from conducting a previously scheduled meeting. Had the Board been able to meet, it would have been able to issue more decisions and thereby meet its goal.
Time Required to Complete Adjudications	Annually	6	6	5	12	Annual Measure	Annual Measure	Annual Measure	Annual Measure	8	Met	
Time Required to Resolve Petitions for Review	Annually	8	5	4	9	Annual Measure	Annual Measure	Annual Measure	Annual Measure	8	Met	
Percent of OEA decisions upheld by D.C. Superior Court and the D.C. Court of Appeals	Annually	93.1%	100%	96%	99%	Annual Measure	Annual Measure	Annual Measure	Annual Measure	97.3%	Nearly Met	The agency cannot predict how the courts will rule on its decisions that are appealed to the courts. Rather the agency seeks to issue decisions which can withstand judicial scrutiny.
Number of Initial Decisions Issued	Quarterly	142	123	118	135	18	34	26	20	98	Unmet	One barrier was the pandemic which made some parties unwilling to participate in virtual hearings opting instead to hold the appeal in abeyance until they feel comfortable with an in-person evidentiary hearing. Another barrier was a decline in the number of Petitions for Appeal that were file.

Measure	Frequency	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target	FY 2020 Quarter 1	FY 2020 Quarter 2	FY 2020 Quarter 3	FY 2020 Quarter 4	FY 2020 Actual	KPI Status	Explanation for Unmet FY 2020 Target
Percent of cases reversing agency decisions	Annually	6.8%	10.9%	10.2%	No Target Set	Annual Measure	Annual Measure	Annual Measure	Annual Measure	13.79%	No Target Set	
2 - Streamline the adjudication process. (2 Measures)												
Percent of appeals involved in mediation process	Quarterly	New in 2018	61%	46%	No Target Set	100%	65.7%	10.3%	41.7%	69.3%	No Target Set	
Percent of appeals resolved through mediation	Quarterly	New in 2018	13%	21.7%	No Target Set	100%	8.7%	0%	0%	47.4%	No Target Set	
3 - Maintain a system to allow the public to have access to all decisions rendered by the OEA. (2 Measures)												
Percent of Initial Decisions uploaded to website	Quarterly	New in 2018	100%	100%	100%	100%	Waiting on Data	100%	100%	100%	Neutral Measure	
Percent of Opinions and Orders uploaded to website	Quarterly	New in 2018	100%	100%	100%	100%	100%	100%	100%	100%	Neutral Measure	

2020 Workload Measures

Measure	FY 2018 Actual	FY 2019 Actual	FY 2020 Quarter 1	FY 2020 Quarter 2	FY 2020 Quarter 3	FY 2020 Quarter 4	FY 2020 PAR
2 - Mediation and Settlement (1 Measure)							
Number of attorney fee appeals mediated	2	1	0	0	0	0	0

2020 Operations

Operations Header	Operations Title	Operations Description	Type of Operations
1 - Render impartial, legally sound decisions in a timely manner. (3 Activities)			
ADJUDICATION PROCESS	Petitions for Appeal	Intake Coordinator reviews Petition for Appeal, determines the type of appeal and assigns to Administrative Judge.	Daily Service
APPEALS	Petitions for Review	Office of the General Counsel reviews Petitions for Review, drafts the Opinion and Order and meets with the Board to present the appeal and issue the decision.	Daily Service
ADJUDICATION PROCESS	Initial Decisions	Administrative Judges process Petitions for Appeal which culminate in the issuance of an Initial Decision.	Daily Service
2 - Streamline the adjudication process. (1 Activity)			
MEDIATION	Mediation and Settlement	The goal of the mediation program is to help the parties, through the negotiation process, reach a settlement that is agreeable to both of them.	Key Project
3 - Maintain a system to allow the public to have access to all decisions rendered by the OEA. (1 Activity)			
INFORMATION TECHNOLOGY	Website	Decisions are uploaded to the agency's website so that the public is able to view the decisions and research the decisions.	Daily Service

2020 Strategic Initiatives

Strategic Initiative Title	Strategic Initiative Description	Completion to Date	Status Update	Explanation for Incomplete Initiative
No strategic initiatives found				

ATTACHMENT #2

Office of Employee Appeals FY2020

Agency Office of Employee Appeals **Agency Code** CH0 **Fiscal Year** 2020

Mission The Office of Employee Appeals (OEA) is an independent agency with a mission is to adjudicate employee appeals and rendering impartial decisions with sound legal reasoning in a timely manner.

Strategic Objectives

Objective Number	Strategic Objective
1	Render impartial, legally sound decisions in a timely manner.
2	Streamline the adjudication process.
3	Maintain a system to allow the public to have access to all decisions rendered by the OEA.

Key Performance Indicators

Measure	Directionality	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Target
1 - Render impartial, legally sound decisions in a timely manner. (6 Measures)					
Number of Opinions and Orders Issued	Up is Better	51	33	19	25
Time Required to Complete Adjudications	Down is Better	6	6	5	12
Time Required to Resolve Petitions for Review	Down is Better	8	5	4	9
Percent of OEA decisions upheld by D.C. Superior Court and the D.C. Court of Appeals	Up is Better	93.1%	100%	96%	99%
Number of Initial Decisions Issued	Up is Better	142	123	118	135
Percent of cases reversing agency decisions	Neutral	6.8%	10.9%	10.2%	Not Available
2 - Streamline the adjudication process. (2 Measures)					
Percent of appeals involved in mediation process	Neutral	New in 2018	61%	46%	Not Available
Percent of appeals resolved through mediation	Neutral	New in 2018	13%	21.7%	Not Available
3 - Maintain a system to allow the public to have access to all decisions rendered by the OEA. (2 Measures)					
Percent of Initial Decisions uploaded to website	Neutral	New in 2018	100%	100%	100%
Percent of Opinions and Orders uploaded to website	Neutral	New in 2018	100%	100%	100%

Operations

Operations Header	Operations Title	Operations Description	Type of Operations
1 - Render impartial, legally sound decisions in a timely manner. (3 Activities)			
ADJUDICATION PROCESS	Petitions for Appeal	Intake Coordinator reviews Petition for Appeal, determines the type of appeal and assigns to Administrative Judge.	Daily Service

Operations Header	Operations Title	Operations Description	Type of Operations
APPEALS	Petitions for Review	Office of the General Counsel reviews Petitions for Review, drafts the Opinion and Order and meets with the Board to present the appeal and issue the decision.	Daily Service
ADJUDICATION PROCESS	Initial Decisions	Administrative Judges process Petitions for Appeal which culminate in the issuance of an Initial Decision.	Daily Service
2 - Streamline the adjudication process. (1 Activity)			
MEDIATION	Mediation and Settlement	The goal of the mediation program is to help the parties, through the negotiation process, reach a settlement that is agreeable to both of them.	Key Project
3 - Maintain a system to allow the public to have access to all decisions rendered by the OEA. (1 Activity)			
INFORMATION TECHNOLOGY	Website	Decisions are uploaded to the agency's website so that the public is able to view the decisions and research the decisions.	Daily Service

Workload Measures

Measure	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual
2 - MEDIATION (1 Measure)			
Number of attorney fee appeals mediated	15	2	1

Strategic Initiatives

Strategic Initiative Title	Strategic Initiative Description	Proposed Completion Date
No strategic initiatives found		

Office of Employee Appeals FY2021

Agency Office of Employee Appeals **Agency Code** CH0 **Fiscal Year** 2021

Mission The Office of Employee Appeals (OEA) is an independent agency with a mission is to adjudicate employee appeals and rendering impartial decisions with sound legal reasoning in a timely manner.

Strategic Objectives

Objective Number	Strategic Objective
1	Render impartial, legally sound decisions in a timely manner.
2	Streamline the adjudication process.
3	Maintain a system to allow the public to have access to all decisions rendered by the OEA.

Key Performance Indicators

Measure	Directionality	FY 2018 Actual	FY 2019 Actual	FY 2020 Actual	FY 2021 Target
1 - Render impartial, legally sound decisions in a timely manner. (6 Measures)					
Number of Opinions and Orders Issued	Up is Better	33	19	18	18
Time Required to Complete Adjudications	Down is Better	6	5	8	12
Time Required to Resolve Petitions for Review	Down is Better	5	4	8	9
Percent of OEA decisions upheld by D.C. Superior Court and the D.C. Court of Appeals	Up is Better	100%	96%	97.3%	100%
Number of Initial Decisions Issued	Up is Better	123	118	98	100
Percent of cases reversing agency decisions	Neutral	21.8%	10.2%	13.8%	No Target Set
2 - Streamline the adjudication process. (2 Measures)					
Percent of appeals involved in mediation process	Neutral	61%	46%	69.3%	No Target Set
Percent of appeals resolved through mediation	Neutral	13%	21.7%	47.4%	No Target Set
3 - Maintain a system to allow the public to have access to all decisions rendered by the OEA. (2 Measures)					
Percent of Initial Decisions uploaded to website	Neutral	100%	100%	100%	100%
Percent of Opinions and Orders uploaded to website	Neutral	100%	100%	100%	100%

Operations

Operations Header	Operations Title	Operations Description	Type of Operations
1 - Render impartial, legally sound decisions in a timely manner. (3 Activities)			
ADJUDICATION PROCESS	Petitions for Appeal	Intake Coordinator reviews Petition for Appeal, determines the type of appeal and assigns to Administrative Judge.	Daily Service
APPEALS	Petitions for Review	Office of the General Counsel reviews Petitions for Review, drafts the Opinion and Order and meets with the Board to present the appeal and issue the decision.	Daily Service

Operations Header	Operations Title	Operations Description	Type of Operations
ADJUDICATION PROCESS	Initial Decisions	Administrative Judges process Petitions for Appeal which culminate in the issuance of an Initial Decision.	Daily Service
2 - Streamline the adjudication process. (1 Activity)			
MEDIATION	Mediation and Settlement	The goal of the mediation program is to help the parties, through the negotiation process, reach a settlement that is agreeable to both of them.	Key Project
3 - Maintain a system to allow the public to have access to all decisions rendered by the OEA. (1 Activity)			
INFORMATION TECHNOLOGY	Website	Decisions are uploaded to the agency's website so that the public is able to view the decisions and research the decisions.	Daily Service

Workload Measures

Measure	FY 2018 Actual	FY 2019 Actual	FY 2020 Actual
2 - Mediation and Settlement (1 Measure)			
Number of attorney fee appeals mediated	2	1	0

Strategic Initiatives

Strategic Initiative Title	Strategic Initiative Description	Proposed Completion Date
No strategic initiatives found		

ATTACHMENT #3

OEA BUDGET, FY2020 AND FY2021, AS OF JAN. 1, 2021 (Q7)

			FY2021 Approved budget	FY2020 Revised budget	FY2020 Expenditures	FY2020 Difference between Revised and Expenditures	Reason for any variation between revised budget and actual expenditures in FY2020 (Narrative)	FY2021 approved budget	FY2021 Revised budget (as of Jan. 1, 2021)	FY2021 Q1 expenditures
Agency Management (1000)		Total $	1,264,531	1,192,124	1,246,166	-54,042		1,264,531	1,264,531	284,911
		Federal $								
		Local $	1,264,531	1,192,124	1,246,166	-54,042		1,264,531	1,264,531	284,911
		SPR $								
		ID $								
	Contracting and Procurement (1020)	Total $	115,628	86,175	69,045	17,130	Due to FY20 Mayor's Budget Reduction and spending freeze	115,628	115,628	10,000
	Information Technology (1040)	Total $	79,357	77,049	69,446	7,603	Due to FY20 Mayor's Budget Reduction and spending freeze	79,357	79,357	15,162
	Customer Service (1085)	Total $	60,495	58,731	68,314	-9,582	Overage is offset with savings in other programs	60,495	60,495	17,611
	Performance Management (1090)	Total $	273,467	274,859	237,921	36,938	Due to FY20 Mayor's Budget Reduction and spending freeze	273,467	273,467	55,439
	Office of Employee Appeals (1100)	Total $	735,585	695,310	801,440	-106,130	Overage is offset with savings in other programs	735,585	735,585	186,700
Adjudication (2000)		Total $								
		Federal $								
		Local $	969,780	1,008,061	991,222	16,839		969,780	969,780	260,022
		SPR $								
		ID $								
	Ajudication Process (2001)	Total $	870,917	929,312	926,235	3,077	Due to FY20 Mayor's Budget Reduction and spending freeze	870,917	870,917	242,255
	Appeals (2002)	Total $	30,680				Realigned budget in FY22	30,680	30,680	-
	Mediation (2003)	Total $	68,182	78,749	64,987	13,762	Due to FY20 Mayor's Budget Reduction and spending freeze	68,182	68,182	17,768

ATTACHMENT #4

OFFICE OF THE CHIEF TECHNOLOGY OFFICER GOVERNMENT OF THE DISTRICT OF COLUMBIA	**MOU Executive Brief OCTO Division**
OCTO Deputy/Executive: Carol Harrison	**Program Manager:** Marshall,Christopher
Agency: DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS (OEA)	**Dollar Amount:** $7,053.58
Date Submitted: Oct 9 2020 5:09PM	**eMOU#:** TO0CH0-2021-01443

Project Description:

This MOU represents services provided by OCTO to the Office of Employee Appeals to support the currently in production OEA CaseTrack application, which was developed by OCTO's Applications Development & Operations program in Fiscal Year 2019. Phase 2 development, which focused on reporting features and functionality, were completed in Fiscal Year 2020.

Risks:

Challenges:

Urgency: ☐ Normal ☐ Rush ☒ Expedite

MEMORANDUM OF UNDERSTANDING

BETWEEN

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

AND

DISTRICT OF COLUMBIA OFFICE OF THE CHIEF TECHNOLOGY OFFICER

FOR FISCAL YEAR 2021

MOU Number: TO0CH0-2021-01443

I. INTRODUCTION

This Memorandum of Understanding (**"MOU"**) is entered into between the **DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS** (**"OEA" or "Buyer Agency"**) and the **DISTRICT OF COLUMBIA OFFICE OF CHIEF TECHNOLOGY OFFICER** (**"OCTO" or "Seller Agency"**), collectively referred to herein as the "Parties" and individually as "Party."

II. LEGAL AUTHORITY FOR MOU

D.C. Official Code § 1-301.01(k).

III. OVERVIEW OF PROGRAM GOALS AND OBJECTIVES

This MOU covers production application support for the OEA CaseTrack application ("Application") for Fiscal Year 2021.

IV. SCOPE OF SERVICES

Pursuant to the applicable authorities and in the furtherance of the shared goals of the Parties to carry out the purposes of this MOU expeditiously and economically, the Parties hereby agree as follows:

A. RESPONSIBILITIES OF SELLER AGENCY

The Seller Agency shall provide:

1. Administration and management of the Application;
2. Monthly Application patching to address all known vulnerabilities;
3. Customer support; and
4. Minor enhancements to the Application, which: (a) fall within the initial scope of development; (b) do not require changes to the underlying architecture; and (c) do not exceed one hundred sixty (160) hours of development tasks during the duration of this MOU.

B. RESPONSIBILITIES OF BUYER AGENCY

The Buyer Agency shall:

1. Provide a point of contact (POC) for OEA;
2. Verify from the OEA side that the Application is operating without issue after each monthly patching cycle; and
3. Agree to the execution of a separate MOU for any development work exceeding one hundred and sixty (160) hours.

V. DURATION OF MOU

The duration of this MOU shall be for **Fiscal Year 2021**, and shall begin on the last date of execution by the Parties, and shall expire on **September 30, 2021**, unless terminated in writing by the Parties prior to expiration pursuant to Section VII of this MOU.

VI. FUNDING PROVISIONS

A. COST OF SERVICES

The total cost for goods and/or services under this MOU shall not exceed **$7,053.58** for Fiscal Year 2021. Funding for goods and/or services shall not exceed the actual cost of the goods and/or services provided, and is based on 20% of the total cost of services to develop the Application ($35,267.92) as support costs.

B. PAYMENT

(1) Payment for the goods and/or services shall be made through an Intra-District advance by the Buyer Agency to the Seller Agency based on the total amount of this MOU **$7,053.58**.

a. Advances to the Seller Agency for the services to be performed and/or goods to be provided shall not exceed the actual costs of the goods or services or the amount of this MOU.
b. The Seller Agency shall receive the advance and bill the Buyer Agency through the Intra-District process only for those goods and/or services actually provided pursuant to the terms of this MOU.

(2) Upon request of the Buyer Agency, the Seller Agency shall provide the Buyer Agency with a listing of itemized services.

(3) The Seller Agency shall:

a. Notify the Buyer Agency within forty-five (45) days prior to the close of the fiscal year if it has reason to believe that all of the advance will not be billed during the current fiscal year; and
b. Return any excess advance to the Buyer Agency by September 30 of the current fiscal year.

(4) In the event of termination of this MOU, payment to the Seller Agency shall be held in abeyance until all required fiscal reconciliation, but not later than September 30 of the then current fiscal year.

C. ANTI-DEFICIENCY CONSIDERATIONS

The Parties acknowledge and agree that nothing in this MOU creates a financial obligation in anticipation of an appropriation, and that all provisions of this MOU, or any subsequent agreement entered into by the Parties pursuant to this MOU, are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08, (iii) D.C. Official Code § 47-105, and (iv) D.C. Official Code § 1-204.46, as the foregoing statutes may be amended from time to time, regardless of whether a particular obligation has been

expressly so conditioned.

VII. TERMINATION

Either Party may terminate this MOU in whole or in part by giving thirty (30) calendar days advance written notice to the other Party.

VIII. NOTICES

The following individuals are the contact points for each Party:

OEA
Gabrielle Smith-Barrow
Operations Manager
955 L'enfant Plaza, SW, Suite 2500
Washington, D.C. 20024
Phone: (202) 727-0009
Email : gabrielle.smith-barrow@dc.gov

OCTO
Christopher Marshall
Program Manager, Application Development & Operations
200 I Street, SE, 5th Floor
Washington, D.C. 20003
Phone : (202) 478-5971
Email : christopher.marshall@dc.gov

IX. MODIFICATIONS

This MOU may be modified only upon prior written agreement of the Parties. Modifications shall be dated and signed by the authorized representatives of the Parties.

X. CONSISTENT WITH LAW

The Parties shall comply with all applicable federal and District laws, rules and regulations whether now in effect or hereafter enacted or promulgated.

XI. COMPLIANCE AND MONITORING

The Seller Agency will be subject to scheduled and unscheduled monitoring reviews to ensure compliance with all applicable requirements.

XII. RECORDS AND REPORTS

The Seller Agency shall maintain records and receipts for the expenditure of all funds provided pursuant to this MOU for a period of no less than three (3) years from the date of expiration or termination of this MOU and, upon the Buyer Agency's request or the request of other officials of the District of Columbia, make these documents available for inspection by duly authorized representatives of the Buyer Agency or other officials of the District of Columbia as may be specified in their respective sole discretion.

XIII. PROCUREMENT PRACTICES REFORM ACT

If a District of Columbia agency or instrumentality plans to utilize the goods and/or services of an agent, contractor, consultant or other third party to provide any of the goods and/or services under this MOU, then the agency or instrumentality shall abide by the provisions of the District of Columbia Procurement Practices Reform Act of 2010 (D.C. Official Code § 2-351.01, et seq.) to procure the goods or services.

XIV. RESOLUTION OF DISPUTES

The Parties' Directors or designees shall resolve all adjustments and disputes arising from services performed under this MOU. The decision of the Parties' Directors related to any disputes referred shall be final. In the event that the Parties are unable to resolve a financial issue, the matter shall be referred to the D.C. Office of the Chief Financial Officer, Office of Financial Operations and Systems.

XV. CONFIDENTIAL INFORMATION

The Parties to this MOU will use, restrict, safeguard and dispose of all information related to services provided by this MOU in accordance with all relevant federal and District statutes, regulations, and policies. Information received by either Party in the performance of responsibilities associated with the performance of this MOU shall remain the property of the Buyer Agency.

IN WITNESS WHEREOF, the Parties hereto have executed this MOU as follows:

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, District of Columbia

Sheila G. Barfield Date: 12/17/2020

Executive Director
Sheila G. Barfield

Office of the Chief Technology Officer, District of Columbia

Lindsey V. Parker Date: 12/17/2020

Chief Technology Officer
Lindsey V. Parker

INTRA-DISTRICT STANDARD REQUEST FORM
Government of District of Columbia

MOU Number: TO0CH0-2021-01443 **Date of MOU:** 12/09/2020

Buyer Information

Agency Name: OEA
Agency Code: CH0
Name of Contact:
Address: 955 L'enfant Plaza, SW, Suite 2500
Telephone #: (202) 727-0009
Fax #:
Date:

Signature

Seller Information

Agency Name: OCTO
Agency Code: TO0
Name of Contact:
Address: 200 I ST, SE WASHINGTON, DC 20003
Telephone #:
Fax #:
Date:

Signature

Service Information and Funding Codes

GOOD/ SERVICE:

Buyer

AGY	YR	ORG	FUND	INDEX	PCA	OBJ	AOBJ	GRANT	PROJ	AG1	AG2	AG3	AMOUNT

Seller

AGY	YR	ORG	FUND	INDEX	PCA	OBJ	AOBJ	GRANT	PROJ	AG1	AG2	AG3	AMOUNT

eMOU Approval History

1/25/2021 12:44:52 AM

TO0CH0-2021-01443

Step Name	Name	Status Name	Status Date	Comments
MOU Author Review	Marshall,Christopher (OCTO) (OCTO)	Approved	12/7/2020 4:34:00 PM	
OCTO General Counsel Review	Radkar, Smruti (OCTO) (OCTO)	Approved	12/9/2020 9:48:40 AM	
OCTO Executives Review	Carol Harrison (OCTO)	Approved	12/9/2020 10:55:12 AM	
Buyer Agency Final Review of MOU	Gabrielle Smith-Barrow (OEA)	Approved	12/13/2020 8:41:25 PM	
MOU Signature - Buyer Agency	Barfield, Sheila (OEA) (OEA)	Signed	12/17/2020 12:29:35 PM	
MOU Signature - OCTO	Lindsey Parker (OCTO) (OCTO)	Signed	12/17/2020 3:45:43 PM	

OEA INTERAGENCY MOUS FY2021, INCLUDING ANTICIPATED MOUS (Q8)

Buyer agency name	Seller agency name	Seller Program name	Seller Program code	Buyer Activity name	Buyer Activity code	Original funding source (i.e. local, federal, SPR)	Service period (dates)	Description of MOU services, including name of project or initiative	Total MOU amount ($), including any modifications	(Final) Date of signature on letter of intent	Date that funds were transferred to the buyer agency
OEA	TO0			CONTRACTING & PROCUREMENT	11020	Local	10/01/2020 - 09/30/2021	OEA Case Management System	7,053.58	12/17/2020	
											.

OFFICE OF THE CHIEF TECHNOLOGY OFFICER GOVERNMENT OF THE DISTRICT OF COLUMBIA	**MOU Executive Brief OCTO Division**
OCTO Deputy/Executive: Barney Krucoff (OCTO)	**Program Manager:** Marshall, Christophe
Agency: DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS (OEA)	**Dollar Amount:** $35,267.92
Date Submitted: Aug 20 2019 11:12AM	**eMOU#:** TO0CH0-2020-01255

Project Description:

OEA would like to engage OCTO to provide consulting services for the OEA Case Management System [Casetrack] application maintenance.

Risks:

Challenges:

Urgency: [X] Normal [ ] Rush [ ] Expedite

MEMORANDUM OF UNDERSTANDING

BETWEEN

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

AND

DISTRICT OF COLUMBIA OFFICE OF THE CHIEF TECHNOLOGY OFFICER

FOR FISCAL YEAR 2020

MOU Number: TO0CH0-2020-01255

I. NON-ELECTRONIC MOU

This MOU is marked as Non-Electronic(Paper) type. Please refer the attachments for this MOU to find related documents.

OFFICE OF THE CHIEF TECHNOLOGY OFFICER GOVERNMENT OF THE DISTRICT OF COLUMBIA	**MOU Routing Slip OCTO Executive Brief Form**

OCTO Department: Applications	**Program Manager:** Stephen Miller
Agency: Office of Employee Appeals (OEA)	**Dollar Amount:** $35,267.92
Date Submitted: 9/30/2019	**eMOU#:** TO0CH0-2020-01255

Project Description:
OEA would like to engage OCTO to provide consulting services for the OEA Case Management System (Casetrack) application maintenance.

Risks:
- None

Challenges:
- None

Urgency: ☐ Normal ☐ Rush ☒ Expedite

APPROVAL FLOW

NAME/CORRESPONDENCE SYMBOL	REQUIRED ACTION (S)	RELEASED	
		INITIAL	DATE
1. Project Coordinator, Cheryl Harris	Required	CH	9/30/2019
2. Interim General Counsel, Smruti Radkar	Required	SR	10/1/19
3. Senior Operations Manager, Stephen Miller	Required	SAM	10/4/19
4. Chief of Staff, Carol Harrison	Required	CLH	10/7/19
5. Chief Technology Officer, Lindsey V. Parker	Required	LR	10/7/19

OFFICE OF THE CHIEF TECHNOLOGY OFFICER GOVERNMENT OF THE DISTRICT OF COLUMBIA	**MOU Executive Brief OCTO Division**
OCTO Deputy/Executive: Barney Krucoff (OCTO)	**Program Manager:** Marshall, Christophe
Agency: DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS (OEA)	**Dollar Amount:** $35,267.92
Date Submitted: Aug 20 2019 11:12AM	**eMOU#:** TO0CH0-2020-01255
Project Description: OEA would like to engage OCTO to provide consulting services for the OEA Case Management System [Casetrack] application maintenance.	
Risks:	
Challenges:	
Urgency:	☐ Normal ☐ Rush ☐ Expedite

MEMORANDUM OF UNDERSTANDING

BETWEEN

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

AND

DISTRICT OF COLUMBIA OFFICE OF THE CHIEF TECHNOLOGY OFFICER

FOR FISCAL YEAR 2020

MOU Number: TO0CH0-2020-01255

I. INTRODUCTION

This Memorandum of Understanding (**"MOU"**) is entered into between the **DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS (OEA or "Buyer Agency")** and the **District of Columbia OFFICE OF CHIEF TECHNOLOGY OFFICER ("OCTO" or "Seller Agency")**, collectively referred to herein as the "Parties" and individually as "Party."

II. LEGAL AUTHORITY FOR MOU

D.C. Official Code § 1-301.01(k)

III. OVERVIEW OF PROGRAM GOALS AND OBJECTIVES

OEA would like to engage OCTO to provide consulting services for the OEA Case Management System [Casetrack] application maintenance; and OEA's agreement to pay for said services once approved. The program goals and objectives are as follow:

Representatives of OCTO and OEA will meet as reasonably necessary, but no less than monthly, to monitor and evaluate performance under this MOU. The monthly meetings, in addition to any other meetings scheduled to satisfy the requirements of this MOU, will:

1. Provide annual application support throughout FY2020, and

2. Make changes and additions to content wording within the OEA Case Management System [Casetrack] application pertaining

IV. SCOPE OF SERVICES

Pursuant to the applicable authorities and in the furtherance of the shared goals of the Parties to carry out the purposes of this MOU expeditiously and economically, the Parties hereby agree as follows:

A. RESPONSIBILITIES OF SELLER AGENCY

The Seller Agency shall:

(1) Attend scheduled meetings between OEA and OCTO to provide consulting services.
(2) Correct any software defects for the production OEA Casetrack application.

(3) Modify OEA Casetrack application that are consistent n language due to legislative/policy changes.

(4) Perform any other maintenance on the OEA Casetrack application that are consistent with the standards and guidelines as established by OCTO, and

(5) Perform all services timely and satisfactory as determined in the sole discretion of OEA.

* This agreement does not include the design, development, or modification of any new web-based software applications nor any application features to existing software

B. RESPONSIBILITIES OF BUYER AGENCY

The Buyer Agency shall:

(1) The Buyer agrees to the terms, projected cost, and fund availability associated with this MOU.
(2) The Buyer agrees to process an advance of the projected cost (as stated i Section VI.A below) to the Seller immediately after execution of this MOU.

(3) The Buyer shall provide all OEA Casetrack content and assume responsibility for all decisions concerning the OEA Casetrack application maintenance pursuant to OCTO Web Standards Guidelines and DC legislation, and

(4) The Buyer shall review all services performed under this MOU to determine if said services were timely and satisfactory before approving associated service costs to be withdrawn by Seller from the Intra-District advance.

V. DURATION OF MOU

The duration of this MOU shall be for **Fiscal Year 2020**, and shall begin on the later of either **Oct 01, 2019**, or the last date of execution by the Parties, and shall expire on **Sep 30, 2020**, unless terminated in writing by the Parties prior to expiration pursuant to Section VII of this MOU.

VI. FUNDING PROVISIONS

A. COST OF SERVICES

The total cost for goods and/or services under this MOU shall not exceed **$35,267.92** for Fiscal Year 2020. Funding for goods and/or services shall not exceed the actual cost of the goods and/or services provided,

based on the rates provided below:

Maintenance Fee = ((20% of Total Development Cost) + License Cost)

Maintenance Fee = ((.2 * $162,839.60) + $2700.00)

Maintenance Fee = ($32,567.92 + $2700.00)

Maintenance Fee = $35,267.92

B. PAYMENT

(1) Payment for the goods and/or services shall be made through an Intra-District advance by the Buyer Agency to the Seller Agency based on the total amount of this MOU **$35,267.92**.

a. Advances to the Seller Agency for the services to be performed and/or goods to be provided shall not exceed the actual costs of the goods or services or the amount of this MOU.
b. The Seller Agency shall receive the advance and bill the Buyer Agency through the Intra-District process only for those goods and/or services actually provided pursuant to the terms of this MOU.

(2) The Seller Agency shall provide the Buyer Agency with online access to listing of itemized services, as well as upon request of the Buyer Agency, which shall be available online at https://services.dcnet.dc.gov.

(3) The Seller Agency shall:

a. Notify the Buyer Agency within forty-five (45) days prior to the close of the fiscal year if it has reason to believe that all of the advance will not be billed during the current fiscal year.
b. Return any excess advance to the Buyer Agency by September 30 of the current fiscal year.

(4) In the event of termination of this MOU, payment to the Seller Agency shall be held in abeyance until all required fiscal reconciliation, but not later than September 30 of the then current fiscal year.

C. ANTI-DEFICIENCY CONSIDERATIONS

The Parties acknowledge and agree that nothing in this MOU creates a financial obligation in anticipation of an appropriation, and that all provisions of this MOU, or any subsequent agreement entered into by the Parties pursuant to this MOU, are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08, (iii) D.C. Official Code § 47-105, and (iv) D.C. Official Code § 1-204.46, as the foregoing statues may be amended from time to time, regardless of whether a particular obligation has been expressly so conditioned.

VII. TERMINATION

Either Party may terminate this MOU in whole or in part by giving thirty (30) calendar days advance written notice to the other Party.

VIII. NOTICES

The following individuals are the contact points for each Party:

OEA

Gabrielle Smith-Barrow
gabrielle.smith-barrow@dc.gov
955 L'enfant Plaza, SW, Suite 2500
Washington, DC, 20024
Phone: (202) 727-0009
Email : gabrielle.smith-barrow@dc.gov

OCTO
Marshall, Christopher (OCTO)
Program Manager
200 I ST SE, 5th Floor
Washington, D.C. 20003
Phone : (202) 478 5971
Email :Christopher.Marshall@dc.gov

IX. MODIFICATIONS

This MOU may be modified only upon prior written agreement of the Parties. Modifications shall be dated and signed by the authorized representatives of the Parties.

X. CONSISTENT WITH LAW

The Parties shall comply with all applicable federal and District laws, rules and regulations whether now in effect or hereafter enacted or promulgated.

XI. COMPLIANCE AND MONITORING

The Seller Agency will be subject to scheduled and unscheduled monitoring reviews to ensure compliance with all applicable requirements.

XII. RECORDS AND REPORTS

The Seller Agency shall maintain records and receipts for the expenditure of all funds provided pursuant to this MOU for a period of no less than three (3) years from the date of expiration or termination of this MOU and, upon the Buyer Agency's or the District of Columbia's request, make these documents available for inspection by duly authorized representatives of the Buyer Agency or other officials of the District of Columbia as may be specified by the District of Columbia in its sole discretion.

XIII. PROCUREMENT PRACTICES ACT

If a District of Columbia agency or instrumentality plans to utilize the goods and/or services of an agent, contractor, consultant or other third party to provide any of the goods and/or services under this MOU, then the agency or instrumentality shall abide by the provisions of the District of Columbia Procurement Practices Reform Act of 2010 (D.C. Official Code § 2-351.01, et seq.) to procure the goods or services.

XIV. RESOLUTION OF DISPUTES

The Parties' Directors or designees shall resolve all adjustments and disputes arising from services performed under this MOU. The decision of the Parties' Directors related to any disputes referred shall be final. In the event that the Parties are unable to resolve a financial issue, the matter shall be referred to the D.C. Office of the Chief Financial Officer, Office of Financial Operations and Systems.

XV. CONFIDENTIAL INFORMATION

The Parties to this MOU will use, restrict, safeguard and dispose of all information related to services provided by this MOU in accordance with all relevant federal and District statutes, regulations, and policies. Information received by either Party in the performance of responsibilities associated with the performance of this MOU shall remain the property of the Buyer Agency.

IN WITNESS WHEREOF, the Parties hereto have executed this MOU as follows:

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

Sheila S. Barfield

Date: Aug. 23, 2019

Barfield, Sheila (OEA)

DISTRICT OF COLUMBIA OFFICE OF THE CHIEF TECHNOLOGY OFFICER

Date: 10/7/2019

CTO
Lindsey Parker (OCTO)

eMOU Approval History

8/23/2019 1:00:28 PM

TO0CH0-2020-01255

Step Name	Name	Status Name	Status Date	Comments
MOU Author Review	Easley, Juan (OCTO) (OCTO)	Approved	8/22/2019 10:23:43 AM	approved

eMOU Approval History

10/4/2019 3:28:32 PM

TO0CH0-2020-01255

Step Name	Name	Status Name	Status Date	Comments
MOU Author Review	Easley, Juan (OCTO) (OCTO)	Approved	8/22/2019 10:23:43 AM	approved
IDSR Form Signature - Buyer Agency	Gabrielle Smith-Barrow (OEA)	Signed	10/1/2019 5:01:44 PM	
OCTO Program Manager Review	Marshall, Christopher (OCTO) (OCTO)	Approved	10/2/2019 4:17:59 PM	
OCTO General Counsel Review	Radkar, Smruti (OCTO) (OCTO)	Approved	10/4/2019 2:33:59 PM	

INTRA-DISTRICT STANDARD REQUEST FORM
Government of District of Columbia

MOU Number: TO0CH0-2020-01255 **Date of MOU:** 10/04/2019

Buyer Information

Agency Name: OEA
Agency Code: CH0
Name of Contact: Xavier Epps
Address: 955 L'enfant Plaza, SW, Suite 2500
Telephone #: (202) 727-0009
Fax #:

Xavier Epps
Signature

Date: 10/02/2019

Seller Information

Agency Name: OCTO
Agency Code: TO0
Name of Contact: Abdi Yusuf
Address: 200 I ST, SE WASHINGTON, DC 20003
Telephone #:
Fax #:

Abdi Yusuf
Signature

Date: 10/01/2019

Service Information and Funding Codes

GOOD/ SERVICE: OEA would like to engage OCTO to provide consulting services for the OEA Case Management System

Buyer

AGY	YR	ORG	FUND	INDEX	PCA	OBJ	AOBJ	GRANT	PROJ	AG1	AG2	AG3	AMOUNT
CH0	20	2002	0100	20002	12002	0408	0408	NA	NA	NA	NA	NA	$35,267.92

Seller

AGY	YR	ORG	FUND	INDEX	PCA	OBJ	AOBJ	GRANT	PROJ	AG1	AG2	AG3	AMOUNT
TO0	20	2000	1363	0AICH	20011	4600	4600	N/A	0AIMCH/02	N/A	N/A	N/A	$35,267.92
TO0	20	2000	1363	0AICH	20011	4600	4600	N/A	0AIMCH/02	N/A	N/A	N/A	$35,267.92

eMOU Approval History

11/15/2019 2:37:30 PM

TO0CH0-2020-01255

Step Name	Name	Status Name	Status Date	Comments
MOU Author Review	Easley, Juan (OCTO) (OCTO)	Approved	8/22/2019 10:23:43 AM	approved
IDSR Form Signature - Buyer Agency	Gabrielle Smith-Barrow (OEA)	Signed	10/1/2019 5:01:44 PM	
OCTO Program Manager Review	Marshall, Christopher (OCTO) (OCTO)	Approved	10/2/2019 4:17:59 PM	
OCTO General Counsel Review	Radkar, Smruti (OCTO) (OCTO)	Approved	10/4/2019 2:33:59 PM	
OCTO Executives Review	Carol Harrison (OCTO)	Approved	10/7/2019 8:59:41 AM	
Buyer Agency Final Review of MOU	Barfield, Sheila (OEA) (OEA)	Approved	10/7/2019 1:38:25 PM	

MOU Signature - Buyer Agency	Gabrielle Smith-Barrow (OEA)	Signed	10/7/2019 1:52:55 PM
IDSR Form Signature - OCTO	Yusuf Abdi (OCTO)	Signed	10/16/2019 4:01:48 PM

Please let me know if there is someone else I should be contacting to resolve this issue.

Thanks

Allegra

Buyer

AGY	YR	ORG	FUND	INDEX	PCA	OBJ	AOBJ	GRANT	PROJ	AG1	AG2
[illegible]											

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S504 V2.1      PRD      DISTRICT OF COLUMBIA R*STARS 2.1      11/12/19 09:54 AM
LINK TO: ____  S D: _   REVENUE/RECEIPTS TRANSACTION ENTRY     NOTE: N    DSNF
BATCH: AGENCY TO0 DATE 101819 TYPE 2 NO 608 SEQ NO 00001 MODE EDIT AND POST
DOC DATE: 102319   EFF DATE: 102319  DUE DATE: ______  SERV DATE: ______
 CUR DOC/SFX: IDAA6080 001  REF DOC/SFX: _____  MOD: _  AGENCY: CH0
  TRANS CODE: 440        INTRA-DISTRCT ADVANCES - BUYER'S SIDE
       INDEX: 20002      APPEALS
         PCA: 12002      APPEALS                                  AY: 20
COMP/AGY/GRANT OBJ: 0408 0408 _____ PROF SERVICE FEES AND  CONT NO: _____
      AMOUNT: 00000035267.92  RVS: _        DESC: FY20 OEA CASE MGMT MOU
 DOC COUNT: 00002   DOC AMT: 0000000000.00 DOC AGY: TO0 FO: _ BANK ID: 150
VEND/MC: _____ ___  NM: ____________________________________________________
PMT TYPE: _ INT: _____ ADD1: ____________________________________________________
   BANK: _____      ADD2: ____________________________________________________
DISC DT: ______ TM: __ ADD3: ____________________________________ CTRY: ___
 PEN DT: ______ TM: __ CITY: _____________________ ST: __  ZIP: _____ ____ __
PEN AMT: _____ CHECK #: _____ DEPOSIT #: _____
    DI#: _____ APPN NO: 11000  FUND: 0100  GL ACCT/AGY: ____ _____
 GRANT NO/PH: _____ __ SUBGRANTEE: _____ PROJ NO/PH: _____ __
 MPCD: _____ AGY CD-1: ____ 2: ____ 3: _____ RTI: _____
F29  CUM AGY BUDG OVREXP  F81  CUM AGY OVREXP P-ENC F30  PM AGY BUDG OVREXP
F82  PM AGY OVREXP P-ENC
F1-HELP  F2-INVOICE  F3-RTI  F4-EDIT  F5-NEXT RTI TRANS F6-BALANCING F7-DETAILS
F8-PRINT  F9-INTERRUPT  F10-SAVE  F11-SAVE/CLEAR  F12-HEADERS  CLEAR-EXIT
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O (202) 724-4583| M (202) 714-9292
Allegra.Arrington@dc.gov

Honor the Best in Public Service! Nominate an outstanding DC Government employee and/or team for the 19th Annual Cafritz Awards by December 6th, 2019.

Honor the Best in Public Service! Nominate an outstanding DC Government employee and/or team for the 19th Annual Cafritz Awards by December 6th, 2019.

OEA INTERAGENCY MOUS, FY2020, INCLUDING ANTICIPATED MOUS (Q9)

Buyer agency name	Seller agency name	Seller Program name	Seller Program code	Buyer Activity name	Buyer Activity code	Original funding source (i.e. local, federal, SPR)	Service period (dates)	Description of MOU services, including name of project or initiative	Total MOU amount ($), including any modifications	(Final) Date of signature on letter of intent	Date that funds were transferred to the buyer agency
OEA	TO0		0AIMCH	CONTRACTING & PROCUREMENT	11020	Local	10/01/2019 - 09/30/2020	OEA Case Management System	35,267.92	10/7/2019	10/23/2019

ATTACHMENT #5

OEA INTERAGENCY REPROGRAMMINGS, FY2020 AND FY2021 (Q10)

Including anticipated reprogrammings for remainder of FY2021

Sending agency name	Receiving agency name	Date of execution (actual or expected)	Dollar amount (actual or expected)	Originating funding source (i.e. local, federal, SPR)	Originating funds			Received funds			Detailed rationale for the reprogramming
					Program code	Activity code	CSG code	Program code	Activity code	CSG code	

ATTACHMENT #6

OEA INTRA-AGENCY REPROGRAMMINGS, FY2020 AND FY2021 (Q11)

Including anticipated reprogrammings for remainder of FY2021

Date of execution (actual or expected)	Dollar amount (actual or expected)	Originating funding source (i.e. local, federal, SPR)	Originating funds			Received funds			Detailed rationale for the reprogra
			Program code	Activity code	CSG code	Program code	Activity code	CSG code	
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

ATTACHMENT #7

Form 2: Operating Budget Enhancement Requests

FY 2022 Agency Budget Submission

Complete a separate Form 2 for each enhancement request in your submission.

SECTION I. OVERVIEW

Required for ALL requests

ENHANCEMENT TITLE*

Agency's Operational Costs

ENHANCEMENT PRIORITY*

1 OUT OF **3**

AGENCY*

Office of Employee Appeals

AGENCY CODE*

CH0

AGENCY POINT OF CONTACT*

Sheila G. Barfield

POINT OF CONTACT EMAIL*

Sheila.barfield@dc.gov

REQUEST TYPE*

Mark the one request type that best describes this enhancement. No type is preferred over any other, but the questions in Section II: Rationale differ by type.

- ☒ **A. Restore previous budget reduction/one-time funding**
- ☐ **B. Increased cost to maintain existing program/activity**
- ☐ **C. Operational improvement with strong business case**

*For these request types, complete **Sections I and II** only*

- ☐ **D. Expand high-performing existing program/activity**
- ☐ **E. Completely new program/activity with highly likely or proven positive outcomes for District residents**

*For these request types, complete **Sections I through V***

FUNDING REQUEST*

Enter amount of Local Funds requested and indicate whether funds are one-time or recurring.

FY 2022 PERSONAL SERVICES (PS)	FY 2022 NON-PERSONAL SERVICES (NPS)	FY 2022 TOTAL REQUEST AMOUNT
[enter amount]	$117,000	$117,000

☐ ONE-TIME ☐ PARTIALLY RECURRING ☒ RECURRING

FUTURE COSTS*

If recurring, enter estimated costs over the life of the Financial Plan.

TOTAL FY 2023	TOTAL FY 2024	TOTAL FY 2025
$119,048	$121,131	Click or tap here to enter text.

ENHANCEMENT SUMMARY*

In one sentence, tell us what this enhancement is.

This enhancement is to fund the agency's operating costs.

ENHANCEMENT IMPACT*

In one sentence, tell us what the expected positive impact is on District residents or government operations.

The expected impact is that the agency will be able to perform its statutorily mandated functions.

AGENCIES: Please use Form 2 to provide additional details about enhancement requests in your FY 2022 budget submission. This information is an important part of the decision-making process. Well thought-out and reasoned requests are much more likely to receive favorable consideration.

FY 2022 Enhancements

As always, we eagerly invite fresh, innovative, evidence-based ideas for improving the quality or efficiency of city services. This is especially true as we face unprecedented challenges resulting from the COVID-19 pandemic.

At the same time, we face significant resource constraints that will drastically limit our ability to fund new initiatives in the FY 2022 budget. Therefore, we are seeking your help in identifying thoughtful, viable cost-saving measures that will afford us the opportunity to continue improving the services we provide to our community.

Enhancement requests to expand existing programs or activities, or to start completely new programs or activities should include in Section III a budget reduction that offsets the amount of the request in whole or in significant part. Offsetting reductions should be in addition to reductions to meet the agency's MARC. Requests accompanied by viable cost-saving options are much more likely to receive favorable consideration.

REQUIRED SECTIONS

- **Sections I and II** are required for ALL requests.
- **Sections I-V** are required for Type D and Type E requests.

Please remember to submit the Form 2 Summary spreadsheet along with the separate Form 2s for each enhancement by your agency's submission deadline.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION I. OVERVIEW (continued)

Required for ALL requests

SPENDING & STAFFING PLAN*

List below, or in an attached spreadsheet, what the requested funds would purchase (e.g., personnel, equipment, contracts). For each proposed FTE, list the grade and position type or title. ***Double-click the table to open the embedded Excel file.***

Item	Description	FTEs	PS	NPS	Total
Supplies and Materials	Office supplies			$2,940	**$2,940**
Services and Charges	Local travel, postage, board member compensation, OCTO VPN, web maintenance, machinery maintenance and repair			$82,688	**$82,688**
Contracting & Procurement	Court reporting services			$30,000	**$30,000**
Equipment	IT acquisitions			$1,372	**$1,372**
	TOTAL	**0.0**	**$0**	**$117,000**	**$117,000**

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION II. RATIONALE

Required for ALL requests

What problem for the District are you aiming to address?*

This enhancement will enable the agency to carry out its statutory mandate to adjudicate appeals filed by District government employees.

What are the reasons why this problem exists?*

This problem exists as a result of having no funding allocated for the agency's operating costs.

How does this enhancement address this problem and its underlying causes?*

This enhancement will enable the agency to carry out its statutory mandate to adjudicate appeals filed by District government employees.

Will legislative support be required?*
If yes, please submit a proposed BSA subtitle using Attachment D.

☐ **YES** ☒ **NO**

FY 2022 POLICY PRIORITIES*
Use the appropriate dropdown menu below to select which one of your cluster's policy priorities for FY 2022 this enhancement would address and explain below how it would do so. If this enhancement addresses multiple priorities, or priorities in other clusters, select the main one and explain any others below. If this enhancement does not address any of your cluster's FY 2022 policy priorities, please explain any other District priorities it addresses.

PLANNING & ECONOMIC DEV.	Choose an item.
PUBLIC SAFETY & JUSTICE	Choose an item.
OPERATIONS & INFRASTRUCTURE	Choose an item.
HEALTH & HUMAN SERVICES	Choose an item.
EDUCATION	Choose an item.
INTERNAL SERVICES	Choose an item.

How does this enhancement support the policy priority or priorities identified above?*

Click or tap here to enter text.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION II. RATIONALE (continued)

Required for ALL requests

QUESTIONS SPECIFIC TO ENHANCEMENT TYPE*

Mark the appropriate enhancement type and use the space below the table to answer the questions for that enhancement type.

IF YOUR ENHANCEMENT TYPE IS…	THEN ANSWER THESE QUESTIONS…
☒ **A. Restore previous budget reduction/one-time funding**	Why is the restoration of this reduction critical for the District at this time? What negative impact will result if this reduction is not restored?
☐ **B. Increased cost to maintain existing program/activity**	Why are costs increasing to maintain existing levels of service? What are the main cost drivers and what options has the agency already implemented or considered implementing to lower these costs?
☐ **C. Operational improvement with a strong business case**	How will this enhancement help the District save money in this or future fiscal years? How much will it save?
☐ **D. Expand high-performing existing program/activity**	Why is this program or activity considered to be high performing? How do the outputs or outcomes compare to those of similar programs within or outside of District government?
☐ **E. Completely new program or initiative with highly likely or proven positive outcomes for District residents**	What will be the District's return on this investment, as measured by how many and/or which District residents are served, and/or relative social benefit?

Responses to Questions*

The restoration of this funding is critical to the operations of the agency. Without funding the agency's operating costs, the agency will not be able to carry out its statutory mandate of adjudicating and resolving appeals filed by District government employees.

STOP HERE for enhancement types **A, B, or C**.

CONTINUE to Section III for enhancements types **D or E**.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION III. PROPOSED OFFSETTING BUDGET REDUCTION

Required for Type D and E requests

Due to resource constraints, requests to expand existing programs or activities or to start completely new programs or activities should include a budget reduction that offsets the amount of the request in whole or in significant part. Offsetting reductions should be in addition to reductions to meet the agency's MARC. Requests accompanied by viable cost-saving options are much more likely to receive favorable consideration.

ENHANCEMENT TITLE*
As it appears in Section I.

Click or tap here to enter text.

TOTAL FY 2022 REQUEST AMOUNT*
As it appears in Section I.

Click or tap here to enter text.

PROPOSED OFFSETTING REDUCTIONS*

List below, or in an attached spreadsheet, the proposed offsetting budget reductions. The reductions must be equal to or greater than the Total FY 2022 Request amount shown above.

Reduction	Description	Total amount reduced	PS amount reduced	NPS amount reduced	FTEs reduced
	TOTAL	**$0**	**$0**	**$0**	**0.0**

Explanation*

Please explain why the reduction(s) shown above is/are viable. What are the anticipated impacts and why are these impacts more palatable than impacts from other potential reductions?

Click or tap here to enter text.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION IV. EVALUATION & PERFORMANCE

Required for Type D and E requests

Required for all enhancement requests to expand existing programs or activities or launch completely new programs or activities. Incomplete submissions will be returned.

What evidence supports the likelihood that this enhancement will achieve the desired outcome?*

Please describe outcomes from similar efforts that have been undertaken before in the District or in other cities. If possible, include formal evaluation studies and lessons learned from both successes and failures in any similar attempts. Provide links to cite your sources.

Click or tap here to enter text.

Is your enhancement identical to the model the evidence comes from?*

- ☐ **YES.** The enhancement is identical to the model the evidence comes from and the population served is similar. Indicate below how you will ensure your agency implements the model fully.
- ☐ **NO.** The enhancement differs from the model the evidence comes from, is just a part of that model, serves a different population, etc. Below, describe how it differs and why.

Click or tap here to enter text.

EVALUATING ENHANCEMENTS

As part of the budget formulation process, OBPM will categorize the research evidence you cite based on whether:

- the study design was rigorous, and the study was well implemented;
- the findings are positive and statistically significant; and
- the evidence is based on a model and population similar to the proposed enhancement.

THE LAB@DC TEAM IS HERE TO HELP!

Have questions about the evidence? Email thelab@dc.gov (and CC your budget analyst). The Lab can pre-review evidence, brainstorm future evaluation ideas, offer suggestions on where to look for evidence, and help you think through the evidence you've found.

If the enhancement is granted, is your agency willing to evaluate whether the enhancement achieves the desired outcome? This could involve piloting the enhancement with District residents or neighborhoods. (The Lab @ DC is able to provide guidance on how to do this.)*

☐ **YES** ☐ **NO**

List any agency key performance indicators (KPIs) impacted by this enhancement.*

List KPIs from most significant to least. If you are proposing a new KPI, write "NEW" in the columns for FY 2019-FY 2021.

KEY PERFORMANCE INDICATOR (KPI)	WHICH DIRECTION IS DESIRED?	FY 2019 ACTUAL	FY 2020 ACTUAL	FY 2021 TARGET

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION V. PROJECT PLAN

Required for Type D and Type E requests

Required for all enhancement requests to expand existing programs or activities or launch completely new programs or activities. Incomplete submissions will be returned.

Complete this draft project plan to show how the agency will deliver the intended results before the end of the fiscal year. This will also help OBPM determine when full funding will be required for implementation. Complete as best you can, knowing the plan might evolve.

PROJECT OWNER*

Who is the single person who will be most responsible for this initiative? If the project owner must be hired, specify who will own the project until that time.

NAME Click or tap here to enter text.
TITLE Click or tap here to enter text.
EMAIL Click or tap here to enter text.
PHONE Click or tap here to enter text.

BUSINESS PARTNER COORDINATION*

What other agencies or stakeholders would be critical to this project's success, and what communication have you had with them?

Click or tap here to enter text.

PROJECT TIMELINE*

Describe below anticipated implementation milestones by month to show how the agency will deliver the intended results.

PREPARATION FOR PROJECT LAUNCH (before start of fiscal year)	
JUNE 2021	
JULY	
AUG	
SEPT	
FISCAL YEAR STARTS, FUNDS DISBURSED	
OCT 2021	
NOV	
DEC	
JAN 2022	
FEB	
MARCH	
APRIL	
MAY	
JUNE	
JULY	
AUG	
SEPT	

Form 2: Operating Budget Enhancement Requests

FY 2022 Agency Budget Submission

Complete a separate Form 2 for each enhancement request in your submission.

SECTION I. OVERVIEW

Required for ALL requests

ENHANCEMENT TITLE*

Maintain Hours of WAE Employees

ENHANCEMENT PRIORITY*

2 OUT OF **3**

AGENCY*

Office of Employee Appeals

AGENCY CODE*

CH0

AGENCY POINT OF CONTACT*

Sheila G. Barfield

POINT OF CONTACT EMAIL*

Sheila.barfield@dc.gov

REQUEST TYPE*

Mark the one request type that best describes this enhancement. No type is preferred over any other, but the questions in Section II: Rationale differ by type.

- ☒ **A. Restore previous budget reduction/one-time funding**
- ☐ **B. Increased cost to maintain existing program/activity**
- ☐ **C. Operational improvement with strong business case**

*For these request types, complete **Sections I and II** only*

- ☐ **D. Expand high-performing existing program/activity**
- ☐ **E. Completely new program/activity with highly likely or proven positive outcomes for District residents**

*For these request types, complete **Sections I through V***

FUNDING REQUEST*

Enter amount of Local Funds requested and indicate whether funds are one-time or recurring.

FY 2022 PERSONAL SERVICES (PS)	FY 2022 NON-PERSONAL SERVICES (NPS)	**FY 2022 TOTAL REQUEST AMOUNT**
$17,059	[enter amount]	$17,059

☐ **ONE-TIME** ☐ **PARTIALLY RECURRING** ☒ **RECURRING**

FUTURE COSTS*

If recurring, enter estimated costs over the life of the Financial Plan.

TOTAL FY 2023	**TOTAL FY 2024**	**TOTAL FY 2025**
$17,358	$17,661	

ENHANCEMENT SUMMARY*

In one sentence, tell us what this enhancement is.

This enhancement is to maintain the working hours of the agency's two WAE employees.

ENHANCEMENT IMPACT*

In one sentence, tell us what the expected positive impact is on District residents or government operations.

The expected impact is that these employees will be able to perform their respective duties.

AGENCIES: Please use Form 2 to provide additional details about enhancement requests in your FY 2022 budget submission. This information is an important part of the decision-making process. Well thought-out and reasoned requests are much more likely to receive favorable consideration.

FY 2022 Enhancements

As always, we eagerly invite fresh, innovative, evidence-based ideas for improving the quality or efficiency of city services. This is especially true as we face unprecedented challenges resulting from the COVID-19 pandemic.

At the same time, we face significant resource constraints that will drastically limit our ability to fund new initiatives in the FY 2022 budget. Therefore, we are seeking your help in identifying thoughtful, viable cost-saving measures that will afford us the opportunity to continue improving the services we provide to our community.

Enhancement requests to expand existing programs or activities, or to start completely new programs or activities should include in Section III a budget reduction that offsets the amount of the request in whole or in significant part. Offsetting reductions should be in addition to reductions to meet the agency's MARC. Requests accompanied by viable cost-saving options are much more likely to receive favorable consideration.

REQUIRED SECTIONS

- **Sections I and II** are required for ALL requests.
- **Sections I-V** are required for Type D and Type E requests.

Please remember to submit the Form 2 Summary spreadsheet along with the separate Form 2s for each enhancement by your agency's submission deadline.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION I. OVERVIEW (continued)

Required for ALL requests

SPENDING & STAFFING PLAN*

List below, or in an attached spreadsheet, what the requested funds would purchase (e.g., personnel, equipment, contracts). For each proposed FTE, list the grade and position type or title. ***Double-click the table to open the embedded Excel file.***

Item	Description	FTEs	PS	NPS	Total
Personnel	Maintain the working hours of the agency's two WAE employees.	1.0	$17,059		**$17,059**
	TOTAL	**1.0**	**$17,059**	**$0**	**$17,059**

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION II. RATIONALE

Required for ALL requests

What problem for the District are you aiming to address?*

This enhancement will enable the agency to carry out its statutory mandate to adjudicate appeals filed by District government employees.

What are the reasons why this problem exists?*

This problem exists because of inadequate funding.

How does this enhancement address this problem and its underlying causes?*

This enhancement will address this problem by enabling these employees to work 40 hours per pay period.

Will legislative support be required?*
If yes, please submit a proposed BSA subtitle using Attachment D.

☐ **YES** ☒ **NO**

FY 2022 POLICY PRIORITIES*
Use the appropriate dropdown menu below to select which one of your cluster's policy priorities for FY 2022 this enhancement would address and explain below how it would do so. If this enhancement addresses multiple priorities, or priorities in other clusters, select the main one and explain any others below. If this enhancement does not address any of your cluster's FY 2022 policy priorities, please explain any other District priorities it addresses.

PLANNING & ECONOMIC DEV.	Choose an item.
PUBLIC SAFETY & JUSTICE	Choose an item.
OPERATIONS & INFRASTRUCTURE	Choose an item.
HEALTH & HUMAN SERVICES	Choose an item.
EDUCATION	Choose an item.
INTERNAL SERVICES	Choose an item.

How does this enhancement support the policy priority or priorities identified above?*

Click or tap here to enter text.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION II. RATIONALE (continued)

Required for ALL requests

QUESTIONS SPECIFIC TO ENHANCEMENT TYPE*
Mark the appropriate enhancement type and use the space below the table to answer the questions for that enhancement type.

IF YOUR ENHANCEMENT TYPE IS…	THEN ANSWER THESE QUESTIONS…
☒ **A. Restore previous budget reduction/one-time funding**	Why is the restoration of this reduction critical for the District at this time? What negative impact will result if this reduction is not restored?
☐ **B. Increased cost to maintain existing program/activity**	Why are costs increasing to maintain existing levels of service? What are the main cost drivers and what options has the agency already implemented or considered implementing to lower these costs?
☐ **C. Operational improvement with a strong business case**	How will this enhancement help the District save money in this or future fiscal years? How much will it save?
☐ **D. Expand high-performing existing program/activity**	Why is this program or activity considered to be high performing? How do the outputs or outcomes compare to those of similar programs within or outside of District government?
☐ **E. Completely new program or initiative with highly likely or proven positive outcomes for District residents**	What will be the District's return on this investment, as measured by how many and/or which District residents are served, and/or relative social benefit?

Responses to Questions*

If this reduction is not restored, the individual goal for the number of decisions to be issued by one of these employees will not be met thereby causing the agency to not meet its overall target. Moreover, there will be a delay in processing and assigning appeals to the Administrative Judges because the other WAE employee affected by this reduction also serves as the agency's Intake Coordinator.

STOP HERE for enhancement types **A, B, or C**.

CONTINUE to Section III for enhancements types **D or E**.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION III. PROPOSED OFFSETTING BUDGET REDUCTION

Required for Type D and E requests

Due to resource constraints, requests to expand existing programs or activities or to start completely new programs or activities should include a budget reduction that offsets the amount of the request in whole or in significant part. Offsetting reductions should be in addition to reductions to meet the agency's MARC. Requests accompanied by viable cost-saving options are much more likely to receive favorable consideration.

ENHANCEMENT TITLE*
As it appears in Section I.

Click or tap here to enter text.

TOTAL FY 2022 REQUEST AMOUNT*
As it appears in Section I.

Click or tap here to enter text.

PROPOSED OFFSETTING REDUCTIONS*

List below, or in an attached spreadsheet, the proposed offsetting budget reductions. The reductions must be equal to or greater than the Total FY 2022 Request amount shown above.

Reduction	**Description**	**Total amount reduced**	**PS** amount reduced	**NPS** amount reduced	**FTEs** reduced
	TOTAL	**$0**	**$0**	**$0**	**0.0**

Explanation*

Please explain why the reduction(s) shown above is/are viable. What are the anticipated impacts and why are these impacts more palatable than impacts from other potential reductions?

Click or tap here to enter text.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION IV. EVALUATION & PERFORMANCE

Required for Type D and E requests

Required for all enhancement requests to expand existing programs or activities or launch completely new programs or activities. Incomplete submissions will be returned.

What evidence supports the likelihood that this enhancement will achieve the desired outcome?*

Please describe outcomes from similar efforts that have been undertaken before in the District or in other cities. If possible, include formal evaluation studies and lessons learned from both successes and failures in any similar attempts. Provide links to cite your sources.

Click or tap here to enter text.

Is your enhancement identical to the model the evidence comes from?*

- ☐ **YES.** The enhancement is identical to the model the evidence comes from and the population served is similar. Indicate below how you will ensure your agency implements the model fully.
- ☐ **NO.** The enhancement differs from the model the evidence comes from, is just a part of that model, serves a different population, etc. Below, describe how it differs and why.

Click or tap here to enter text.

EVALUATING ENHANCEMENTS

As part of the budget formulation process, OBPM will categorize the research evidence you cite based on whether:

- the study design was rigorous, and the study was well implemented;
- the findings are positive and statistically significant; and
- the evidence is based on a model and population similar to the proposed enhancement.

THE LAB@DC TEAM IS HERE TO HELP!

Have questions about the evidence? Email thelab@dc.gov (and CC your budget analyst). The Lab can pre-review evidence, brainstorm future evaluation ideas, offer suggestions on where to look for evidence, and help you think through the evidence you've found.

If the enhancement is granted, is your agency willing to evaluate whether the enhancement achieves the desired outcome? This could involve piloting the enhancement with District residents or neighborhoods. (The Lab @ DC is able to provide guidance on how to do this.)*

☐ **YES** ☐ **NO**

List any agency key performance indicators (KPIs) impacted by this enhancement.*

List KPIs from most significant to least. If you are proposing a new KPI, write "NEW" in the columns for FY 2019-FY 2021.

KEY PERFORMANCE INDICATOR (KPI)	WHICH DIRECTION IS DESIRED?	FY 2019 ACTUAL	FY 2020 ACTUAL	FY 2021 TARGET

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION V. PROJECT PLAN

Required for Type D and Type E requests

Required for all enhancement requests to expand existing programs or activities or launch completely new programs or activities. Incomplete submissions will be returned.

Complete this draft project plan to show how the agency will deliver the intended results before the end of the fiscal year. This will also help OBPM determine when full funding will be required for implementation. Complete as best you can, knowing the plan might evolve.

PROJECT OWNER*

Who is the single person who will be most responsible for this initiative? If the project owner must be hired, specify who will own the project until that time.

NAME Click or tap here to enter text.
TITLE Click or tap here to enter text.
EMAIL Click or tap here to enter text.
PHONE Click or tap here to enter text.

BUSINESS PARTNER COORDINATION*

What other agencies or stakeholders would be critical to this project's success, and what communication have you had with them?

Click or tap here to enter text.

PROJECT TIMELINE*

Describe below anticipated implementation milestones by month to show how the agency will deliver the intended results.

PREPARATION FOR PROJECT LAUNCH (before start of fiscal year)	
JUNE 2021	
JULY	
AUG	
SEPT	
FISCAL YEAR STARTS, FUNDS DISBURSED	
OCT 2021	
NOV	
DEC	
JAN 2022	
FEB	
MARCH	
APRIL	
MAY	
JUNE	
JULY	
AUG	
SEPT	

Form 2: Operating Budget Enhancement Requests

FY 2022 Agency Budget Submission

Complete a separate Form 2 for each enhancement request in your submission.

SECTION I. OVERVIEW

Required for ALL requests

ENHANCEMENT TITLE*

Adjudicating Safety Sensitive Appeals

ENHANCEMENT PRIORITY*

3 OUT OF **3**

AGENCY*

Office of Employee Appeals

AGENCY CODE*

CH0

AGENCY POINT OF CONTACT*

Sheila G. Barfield

POINT OF CONTACT EMAIL*

Sheila.barfield@dc.gov

REQUEST TYPE*

Mark the one request type that best describes this enhancement. No type is preferred over any other, but the questions in Section II: Rationale differ by type.

- ☐ **A. Restore previous budget reduction/one-time funding**
- ☒ **B. Increased cost to maintain existing program/activity**
- ☐ **C. Operational improvement with strong business case**

*For these request types, complete **Sections I and II** only*

- ☐ **D. Expand high-performing existing program/activity**
- ☐ **E. Completely new program/activity with highly likely or proven positive outcomes for District residents**

*For these request types, complete **Sections I through V***

FUNDING REQUEST*

Enter amount of Local Funds requested and indicate whether funds are one-time or recurring.

FY 2022 PERSONAL SERVICES (PS)	FY 2022 NON-PERSONAL SERVICES (NPS)	**FY 2022 TOTAL REQUEST AMOUNT**
[enter amount]	$60,000	$60,000

☐ **ONE-TIME** ☐ **PARTIALLY RECURRING** ☒ **RECURRING**

FUTURE COSTS*

If recurring, enter estimated costs over the life of the Financial Plan.

TOTAL FY 2023	**TOTAL FY 2024**	**TOTAL FY 2025**
$61,050	$62,118	Click or tap here to enter text.

ENHANCEMENT SUMMARY*

In one sentence, tell us what this enhancement is.

This funding is needed to adjudicate appeals that will be filed as a result of OEA's expanded jurisdiction to include adjudicating appeals involving safety sensitive positions.

ENHANCEMENT IMPACT*

In one sentence, tell us what the expected positive impact is on District residents or government operations.

The expected impact is that the agency will be able to adjudicate these appeals in a timely manner.

AGENCIES: Please use Form 2 to provide additional details about enhancement requests in your FY 2022 budget submission. This information is an important part of the decision-making process. Well thought-out and reasoned requests are much more likely to receive favorable consideration.

FY 2022 Enhancements

As always, we eagerly invite fresh, innovative, evidence-based ideas for improving the quality or efficiency of city services. This is especially true as we face unprecedented challenges resulting from the COVID-19 pandemic.

At the same time, we face significant resource constraints that will drastically limit our ability to fund new initiatives in the FY 2022 budget. Therefore, we are seeking your help in identifying thoughtful, viable cost-saving measures that will afford us the opportunity to continue improving the services we provide to our community.

Enhancement requests to expand existing programs or activities, or to start completely new programs or activities should include in Section III a budget reduction that offsets the amount of the request in whole or in significant part. Offsetting reductions should be in addition to reductions to meet the agency's MARC. Requests accompanied by viable cost-saving options are much more likely to receive favorable consideration.

REQUIRED SECTIONS

- **Sections I and II** are required for ALL requests.
- **Sections I-V** are required for Type D and Type E requests.

Please remember to submit the Form 2 Summary spreadsheet along with the separate Form 2s for each enhancement by your agency's submission deadline.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION I. OVERVIEW (continued)

Required for ALL requests

SPENDING & STAFFING PLAN*

List below, or in an attached spreadsheet, what the requested funds would purchase (e.g., personnel, equipment, contracts). For each proposed FTE, list the grade and position type or title. ***Double-click the table to open the embedded Excel file.***

Item	Description	FTEs	PS	NPS	Total
Contracting & Procurement	Court reporting services			$60,000	**$60,000**
	TOTAL	**0.0**	**$0**	**$60,000**	**$60,000**

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION II. RATIONALE

Required for ALL requests

What problem for the District are you aiming to address?*

This enhancement will enable the agency to carry out its statutory mandate to adjudicate appeals involving safety sensitive positions filed by District government employees.

What are the reasons why this problem exists?*

This problem exists as a result of OEA's jurisdiction being expanded at the start of FY 2022.

How does this enhancement address this problem and its underlying causes?*

This enhancement will enable the agency to adjudicate these appeals in a timely manner.

Will legislative support be required?* ☐ **YES** ☒ **NO**
If yes, please submit a proposed BSA subtitle using Attachment D.

FY 2022 POLICY PRIORITIES*
Use the appropriate dropdown menu below to select which one of your cluster's policy priorities for FY 2022 this enhancement would address and explain below how it would do so. If this enhancement addresses multiple priorities, or priorities in other clusters, select the main one and explain any others below. If this enhancement does not address any of your cluster's FY 2022 policy priorities, please explain any other District priorities it addresses.

PLANNING & ECONOMIC DEV.	Choose an item.
PUBLIC SAFETY & JUSTICE	Choose an item.
OPERATIONS & INFRASTRUCTURE	Choose an item.
HEALTH & HUMAN SERVICES	Choose an item.
EDUCATION	Choose an item.
INTERNAL SERVICES	Choose an item.

How does this enhancement support the policy priority or priorities identified above?*

Click or tap here to enter text.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION II. RATIONALE (continued)

Required for ALL requests

QUESTIONS SPECIFIC TO ENHANCEMENT TYPE*
Mark the appropriate enhancement type and use the space below the table to answer the questions for that enhancement type.

IF YOUR ENHANCEMENT TYPE IS…	THEN ANSWER THESE QUESTIONS…
☐ **A. Restore previous budget reduction/one-time funding**	Why is the restoration of this reduction critical for the District at this time? What negative impact will result if this reduction is not restored?
☒ **B. Increased cost to <u>maintain</u> existing program/activity**	Why are costs increasing to maintain existing levels of service? What are the main cost drivers and what options has the agency already implemented or considered implementing to lower these costs?
☐ **C. Operational improvement with a strong business case**	How will this enhancement help the District save money in this or future fiscal years? How much will it save?
☐ **D. Expand high-performing existing program/activity**	Why is this program or activity considered to be high performing? How do the outputs or outcomes compare to those of similar programs within or outside of District government?
☐ **E. Completely new program or initiative with highly likely or proven positive outcomes for District residents**	What will be the District's return on this investment, as measured by how many and/or which District residents are served, and/or relative social benefit?

Responses to Questions*

OEA's jurisdiction will be expanded beginning at the start of FY 2022 so that the agency will adjudicate appeals involving safety sensitive positions. As the agency develops this new body of law, more evidentiary hearings will need to be conducted. Additional funding is needed to adjudicate these new appeals.

STOP HERE for enhancement types **A, B, or C**.

CONTINUE to Section III for enhancements types **D or E**.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION III. PROPOSED OFFSETTING BUDGET REDUCTION

Required for Type D and E requests

Due to resource constraints, requests to expand existing programs or activities or to start completely new programs or activities should include a budget reduction that offsets the amount of the request in whole or in significant part. Offsetting reductions should be in addition to reductions to meet the agency's MARC. Requests accompanied by viable cost-saving options are much more likely to receive favorable consideration.

ENHANCEMENT TITLE*
As it appears in Section I.

Click or tap here to enter text.

TOTAL FY 2022 REQUEST AMOUNT*
As it appears in Section I.

Click or tap here to enter text.

PROPOSED OFFSETTING REDUCTIONS*

List below, or in an attached spreadsheet, the proposed offsetting budget reductions. The reductions must be equal to or greater than the Total FY 2022 Request amount shown above.

Reduction	Description	Total amount reduced	PS amount reduced	NPS amount reduced	FTEs reduced
	TOTAL	$0	$0	$0	0.0

Explanation*

Please explain why the reduction(s) shown above is/are viable. What are the anticipated impacts and why are these impacts more palatable than impacts from other potential reductions?

Click or tap here to enter text.

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION IV. EVALUATION & PERFORMANCE

Required for Type D and E requests

Required for all enhancement requests to expand existing programs or activities or launch completely new programs or activities. Incomplete submissions will be returned.

What evidence supports the likelihood that this enhancement will achieve the desired outcome?*

Please describe outcomes from similar efforts that have been undertaken before in the District or in other cities. If possible, include formal evaluation studies and lessons learned from both successes and failures in any similar attempts. Provide links to cite your sources.

Click or tap here to enter text.

Is your enhancement identical to the model the evidence comes from?*

- ☐ **YES.** The enhancement is identical to the model the evidence comes from and the population served is similar. Indicate below how you will ensure your agency implements the model fully.
- ☐ **NO.** The enhancement differs from the model the evidence comes from, is just a part of that model, serves a different population, etc. Below, describe how it differs and why.

Click or tap here to enter text.

EVALUATING ENHANCEMENTS

As part of the budget formulation process, OBPM will categorize the research evidence you cite based on whether:

- the study design was rigorous, and the study was well implemented;
- the findings are positive and statistically significant; and
- the evidence is based on a model and population similar to the proposed enhancement.

THE LAB@DC TEAM IS HERE TO HELP!

Have questions about the evidence? Email thelab@dc.gov (and CC your budget analyst). The Lab can pre-review evidence, brainstorm future evaluation ideas, offer suggestions on where to look for evidence, and help you think through the evidence you've found.

If the enhancement is granted, is your agency willing to evaluate whether the enhancement achieves the desired outcome? This could involve piloting the enhancement with District residents or neighborhoods. (The Lab @ DC is able to provide guidance on how to do this.)*

☐ **YES** ☐ **NO**

List any agency key performance indicators (KPIs) impacted by this enhancement.*

List KPIs from most significant to least. If you are proposing a new KPI, write "NEW" in the columns for FY 2019-FY 2021.

KEY PERFORMANCE INDICATOR (KPI)	WHICH DIRECTION IS DESIRED?	FY 2019 ACTUAL	FY 2020 ACTUAL	FY 2021 TARGET

Form 2: Operating Budget Enhancement Requests
FY 2022 Agency Budget Submission

SECTION V. PROJECT PLAN

Required for Type D and Type E requests

Required for all enhancement requests to expand existing programs or activities or launch completely new programs or activities. Incomplete submissions will be returned.

Complete this draft project plan to show how the agency will deliver the intended results before the end of the fiscal year. This will also help OBPM determine when full funding will be required for implementation. Complete as best you can, knowing the plan might evolve.

PROJECT OWNER*

Who is the single person who will be most responsible for this initiative? If the project owner must be hired, specify who will own the project until that time.

NAME Click or tap here to enter text.
TITLE Click or tap here to enter text.
EMAIL Click or tap here to enter text.
PHONE Click or tap here to enter text.

BUSINESS PARTNER COORDINATION*

What other agencies or stakeholders would be critical to this project's success, and what communication have you had with them?

Click or tap here to enter text.

PROJECT TIMELINE*

Describe below anticipated implementation milestones by month to show how the agency will deliver the intended results.

PREPARATION FOR PROJECT LAUNCH (before start of fiscal year)	
JUNE 2021	
JULY	
AUG	
SEPT	
FISCAL YEAR STARTS, FUNDS DISBURSED	
OCT 2021	
NOV	
DEC	
JAN 2022	
FEB	
MARCH	
APRIL	
MAY	
JUNE	
JULY	
AUG	
SEPT	

Form 2 Summary: FY 2022 Enhancement Requests & Offsetting Reductions

FY 2022 Agency Budget Submission

AGENCY INFORMATION

Agency Code	**CH0**
Agency Name	**Office of Employee Appeals**
Agency Point of Contact	**Sheila G. Barfield**
Agency POC Email	sheila.barfield@dc.gov
Agency POC Phone	202.727.0004

AGENCIES: Please complete this form to provide a summary view of all enhancement requests submitted by your agency, as well as offsetting reductions for any requests to expand existing high-performing programs or to launch completely new programs or initiatives. Remember to complete a separate Form 2 (Detail) for each enhancement request. **Sort the table below by the agency's priority ranking of enhancements. Insert additional lines as necessary. For recurring enhancements and/or reductions, please note out-year costs. If in doubt, use a multiplier of 1.75%.**

ENHANCEMENT REQUESTS

Enhancement Title	Enhancement Type As indicated on Form 2	Summary Description In the first sentence, describe the enhancement. In the second, describe the likely impact	Total amount requested	PS amount requested	NPS amount requested	# of FTEs requested	FY22	FY23	FY24	Agency Priority
Agency's Operating Costs	A. Restore previous budget reduction/one-time funding	This funding is needed so that OEA will be able to operate and therby carry out its mission critical services.	**$117,000**		$117,000	**0.0**	$117,000	$119,048	$121,131	**1 of 3**
Maintain Hours of WAE Employees	A. Restore previous budget reduction/one-time funding	OEA needs both of its WAE employees to be able to work 40 hours per pay period so that the agency's performance goals will not be negatively impacted.	**$17,059**	$17,059			$17,059	$17,358	$17,661	**2 of 3**
Adjudicating Safety Sensitive Position Appeals	B. Increased cost to main existing program/activity	OEA's jurisdiction will be expanded at the start of FY 2022 so that the agency will adjudicate appeals involving safety sensitive positions. Additional funding will be needed to adjudicate these new appeals.	**$60,000**		$60,000		60,000.0	$61,050	$62,118	**$63,205**
			$0							
			$0							
			$0							
			$194,059	$17,059	$177,000	**0.0**	$194,059	$197,455	$200,910	

OFFSETTING REDUCTIONS

Reduction Title	Corresponding Enhancement As shown above	Description & Impact Details Describe this reduction and the expected opertional impacts, including any notable impact on District residents and/or agency KPIs.	Total amount reduced	PS amount reduced	NPS amount reduced	# of FTEs reduced	FY22	FY23	FY24
			$0				$0	$0	$0
			$0				$0	$0	$0
			$0				$0	$0	$0
			$0				$0	$0	$0
			$0				$0	$0	$0
			$0				$0	$0	$0
			$0	$0	$0	**0.0**	$0	$0	$0

ATTACHMENT #8

OEA CONTRACTS AND PROCUREMENTS, FY2020 AND FY2021, AS OF JAN. 15, 2021 (Q13) Q13 Contracts

(complete columns A-W)

Contract Number, as it appears in OCP's Awarded Contracts Database	Contractor /Vendor Name	Specific description of contractual goods and/or services	Names of any subcontractors	Period of performance (dates)	Current year of contract (e.g. Base Year, Option Year 1, etc.)	Program code	Activity code	Index code	PCA code	Requisition numbers	Purchase order numbers	Maximum or total contract or procurement value in FY2020, per contract	Actual expenditures in FY2020 for each contract	Maximum or total contract or procurement value in FY2021	Total actual payments made in FY2021 for each contract
	WEST PUBLISHING CORP	Legal Research		10/01/2020 - 09/30/2021	Option Year 1			10000	11020	RK173031	PO638110			$10,332.00	

ATTACHMENT #9

FY2020 Credit and Purchase Card Purchases

Cardholder Last Name	Cardholder First Name	Transaction Date
SMITHBARROW	GABRIELLE	11/12/2019
SMITHBARROW	GABRIELLE	12/06/2019
SMITHBARROW	GABRIELLE	12/30/2019
SMITHBARROW	GABRIELLE	01/01/2020
SMITHBARROW	GABRIELLE	01/06/2020
SMITHBARROW	GABRIELLE	01/11/2020
SMITHBARROW	GABRIELLE	01/28/2020
SMITHBARROW	GABRIELLE	01/28/2020
SMITHBARROW	GABRIELLE	01/28/2020
SMITHBARROW	GABRIELLE	01/28/2020
SMITHBARROW	GABRIELLE	01/28/2020
SMITHBARROW	GABRIELLE	01/28/2020
SMITHBARROW	GABRIELLE	02/03/2020
SMITHBARROW	GABRIELLE	02/10/2020
SMITHBARROW	GABRIELLE	02/11/2020
SMITHBARROW	GABRIELLE	03/10/2020
SMITHBARROW	GABRIELLE	03/10/2020
SMITHBARROW	GABRIELLE	03/16/2020
SMITHBARROW	GABRIELLE	03/23/2020
SMITHBARROW	GABRIELLE	03/23/2020
SMITHBARROW	GABRIELLE	04/13/2020
SMITHBARROW	GABRIELLE	04/13/2020
SMITHBARROW	GABRIELLE	06/04/2020
SMITHBARROW	GABRIELLE	07/12/2020
SMITHBARROW	GABRIELLE	07/17/2020
SMITHBARROW	GABRIELLE	07/17/2020
SMITHBARROW	GABRIELLE	09/14/2020
SMITHBARROW	GABRIELLE	09/15/2020
SMITHBARROW	GABRIELLE	09/15/2020
SMITHBARROW	GABRIELLE	09/15/2020
SMITHBARROW	GABRIELLE	09/15/2020
SMITHBARROW	GABRIELLE	09/28/2020
SMITHBARROW	GABRIELLE	09/28/2020

FY2021 Credit and Purchase Card Purchases

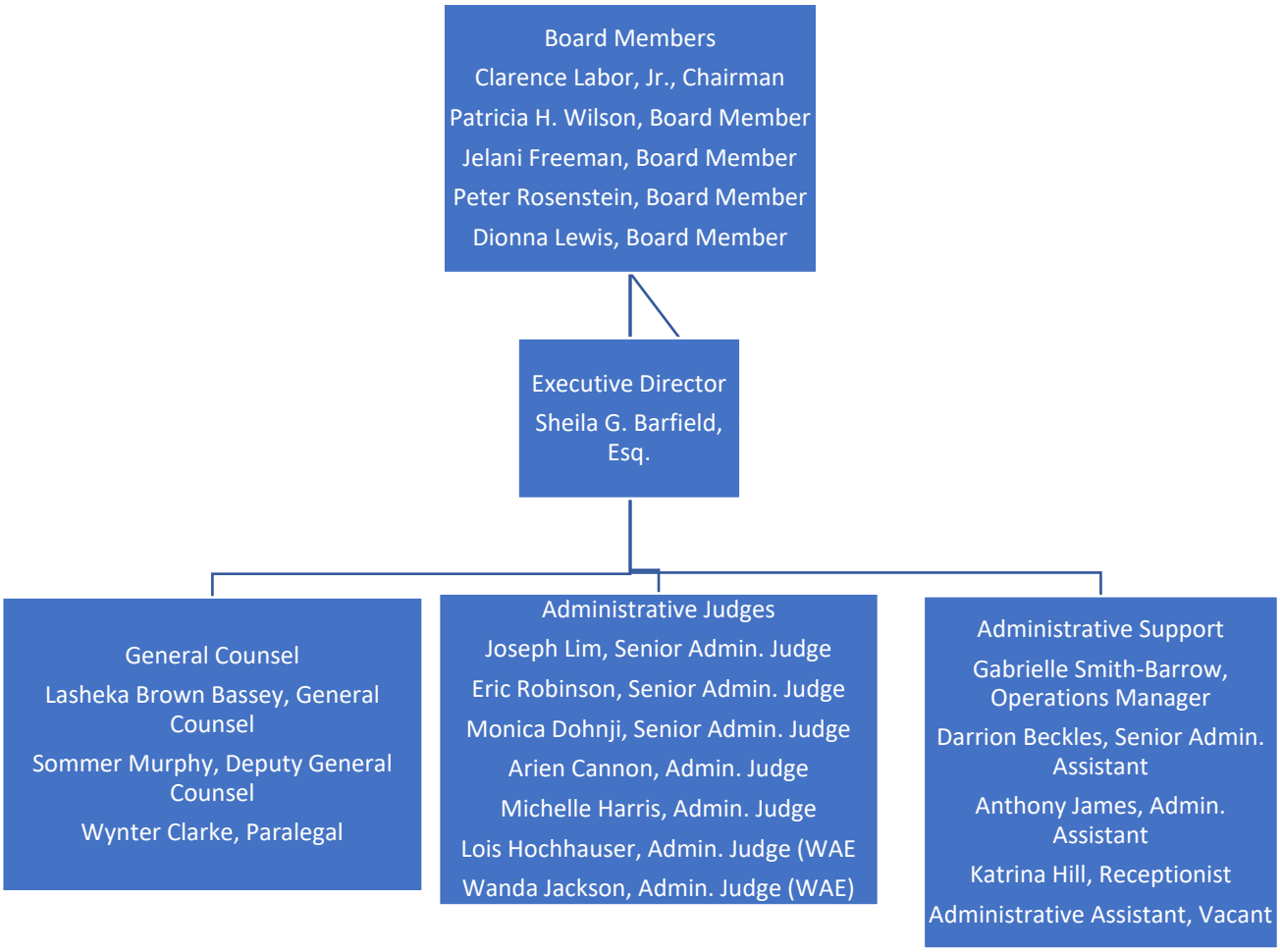
Cardholder Last Name	Cardholder First Name	Transaction Date
SMITHBARROW	GABRIELLE	10/13/2020
SMITHBARROW	GABRIELLE	10/16/2020
SMITHBARROW	GABRIELLE	10/21/2020
SMITHBARROW	GABRIELLE	10/22/2020
SMITHBARROW	GABRIELLE	12/21/2020
SMITHBARROW	GABRIELLE	12/21/2020
SMITHBARROW	GABRIELLE	12/21/2020
SMITHBARROW	GABRIELLE	12/28/2020
SMITHBARROW	GABRIELLE	12/28/2020

Merchant Name	Transaction Amount	Transaction Notes
SUPERIOR COURIERS LLC	140.00	
SUPERIOR COURIERS LLC	140.00	
STANDARD OFFICE SUPPLY	310.83	
PITNEY BOWES PI	201.39	pitney bowes stamp machine ink cartridge.
STANDARD OFFICE SUPPLY	36.02	
PITNEY BOWES PI	183.58	
NEAL R. GROSS & CO., I	225.00	
NEAL R. GROSS & CO., I	803.11	
NEAL R. GROSS & CO., I	225.00	
NEAL R. GROSS & CO., I	398.86	
NEAL R. GROSS & CO., I	1,406.79	
NEAL R. GROSS & CO., I	506.66	
NEAL R. GROSS & CO., I	377.30	
SUPERIOR COURIERS LLC	140.00	
NEAL R. GROSS & CO., I	225.00	
NEAL R. GROSS & CO., I	716.87	
NEAL R. GROSS & CO., I	797.72	
AMZN MKTP US	210.58	
NEAL R. GROSS & CO., I	1,595.44	
NEAL R. GROSS & CO., I	641.41	
NEAL R. GROSS & CO., I	1,541.54	
NEAL R. GROSS & CO., I	225.00	
NEAL R. GROSS & CO., I	544.39	
ADOBE ACROPRO SUBS	2,161.13	
NEAL R. GROSS & CO., I	625.24	
NEAL R. GROSS & CO., I	431.20	
NEAL R. GROSS & CO., I	3,077.69	
NEAL R. GROSS & CO., I	1,638.56	
NEAL R. GROSS & CO., I	646.80	
NEAL R. GROSS & CO., I	964.81	
NEAL R. GROSS & CO., I	501.27	
NEAL R. GROSS & CO., I	2,053.59	
STANDARD OFFICE SUPPLY	169.95	

Merchant Name	Transaction Amount	Transaction Notes
STANDARD OFFICE SUPPLY	173.98	
STANDARD OFFICE SUPPLY	10.99	
STANDARD OFFICE SUPPLY	100.00	
STANDARD OFFICE SUPPLY	159.98	
NEAL R. GROSS & CO., I	3,136.98	
NEAL R. GROSS & CO., I	225.00	
NEAL R. GROSS & CO., I	258.72	
NEAL R. GROSS & CO., I	225.00	
NEAL R. GROSS & CO., I	2,802.80	

ATTACHMENT #10

Q.16 ORG CHART



ATTACHMENT #11

Q17 SCHEDUL A (PERSONNEL)

CHART OF OEA AGENCY PERSONNEL, as of JAN. 1, 2021 (Q17)

Position number	Position status (A-active, R-frozen)	Vacancy Status (V/F)	Job title	Program name	Program code	Activity name	Activity code	Employee's name (leave blank if position is vacant)	Reports to name	Grade level	Step	Salary	Fund code	Type of appointment (e.g. careeer, excepted, MSS)	Job status (i.e. continuing, term, or temporary)	Full-time, part-time	WAE (yes/no)	Seasonal or year-round	Hire (start) date into the position	Position effective date	Not-to-Exceed date	Hire (start) date in District government	DC Residency status (Yes/no)
00032406	A	F	Senior Administrative Assistan	AGENCY MANAGEMENT	1040	INFORMATION TECHNOLOGY	1040	Beckles,Darrion James	Smith Barrow,Gabrielle P	9	3	54,323	0100		Reg	F	N			3/1/2020		3/29/2020	
00026005	A	F	Receptionist	AGENCY MANAGEMENT	1085	CUSTOMER SERVICE	1085	Hill,Katrina	Smith Barrow,Gabrielle P	6	10	50,120	0100		Reg	F	N			10/1/2017		5/5/1997	
00007174	A	F	EXECUTIVE DIR	AGENCY MANAGEMENT	1090	PERFORMANCE MANAGEMENT	1090	Barfield,Sheila	Barfield,Sheila	17	0	187,095	0100		Reg	F	N			7/20/2018		10/18/1993	
00088930	A	V	Administrative Assistant	AGENCY MANAGEMENT	1090	PERFORMANCE MANAGEMENT	1090		Milner Jr.,Robert W	6	0	38,141	0100		Reg	F	N			7/9/2018	9/30/2016		
00006993	A	F	GEN COUNSEL	AGENCY MANAGEMENT	1100	OFFICE OF EMPLOYEE APPEALS	0100	Bassey,Lasheka Brown	Barfield,Sheila	15	9	178,626	0100		Reg	F	N			10/1/2017		5/15/2005	
00018547	A	F	Operations Manager	AGENCY MANAGEMENT	1100	OFFICE OF EMPLOYEE APPEALS	0100	Smith Barrow,Gabrielle	Barfield,Sheila	14	8	126,897	0100		Reg	F	N			10/1/2017		10/7/2002	
00036540	A	F	PARALEGAL SPECIALIST	AGENCY MANAGEMENT	1100	OFFICE OF EMPLOYEE APPEALS	0100	Clarke,Wynter A	Bassey,Lasheka Brown	12	5	85,570	0100		Reg	F	N			10/1/2017		5/23/2016	
00036642	A	F	SENIOR HEARING EXAMINER	AGENCY MANAGEMENT	1100	OFFICE OF EMPLOYEE APPEALS	0100	Robinson,Eric Theodore	Barfield,Sheila	15	4	157,041	0100		Reg	F	N			10/1/2018		6/12/2005	
00037517	A	F	Administrative Assistant	AGENCY MANAGEMENT	1100	OFFICE OF EMPLOYEE APPEALS	0100	James,Anthony Lester	Smith Barrow,Gabrielle P	6	10	50,120	0100		Reg	F	N			10/1/2017	8/25/2006	7/25/2005	
00014026	A	F	SENIOR HEARING EXAMINER	ADJUDICATION	2001	ADJUDICATION PROCESS	2001	Lim,Joseph Edward	Barfield,Sheila	15	5	161,798	0100		Reg	F	N			10/1/2018		8/3/1998	
00019834	A	F	SENIOR HEARING EXAMINER	ADJUDICATION	2001	ADJUDICATION PROCESS	2001	Dohnji,Monica N	Barfield,Sheila	15	4	157,041	0100		Reg	F	N			10/1/2018		5/26/2011	
00047295	A	F	Deputy General Counsel	ADJUDICATION	2001	ADJUDICATION PROCESS	2001	Murphy,Sommer Joy	Bassey,Lasheka Brown	14	7	145,645	0100		Reg	F	N			9/1/2019		6/9/2008	
00075085	A	F	HEARING EXAMINER	ADJUDICATION	2001	ADJUDICATION PROCESS	2001	Harris,Michelle R	Barfield,Sheila	14	5	137,553	0100		Reg	F	N			10/1/2018		7/27/2015	
00077069	A	F	HEARING EXAMINER	ADJUDICATION	2001	ADJUDICATION PROCESS	2001	Cannon,Arien Peyton	Barfield,Sheila	14	6	141,599	0100		Reg	F	N			10/1/2018		10/1/2012	
00001974	A	F	HEARING EXAMINER	ADJUDICATION	2001	ADJUDICATION PROCESS	2001	Hochhauser,Lois C	Barfield,Sheila	14	4	66,754	0100		Reg	P	Y			10/1/2018		4/3/1985	
00010846	A	F	HEARING EXAMINER	ADJUDICATION	2003	MEDIATION	2003	Jackson,Wanda L	Barfield,Sheila	14	4	66,754	0100		Reg	P	Y			10/1/2018	7/31/2005	11/18/1978	

ATTACHMENT #12

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION—CIVIL ACTIONS BRANCH

LINDA SUN,	*	
	*	
Petitioner,	*	Civil Case No. 2017 CA 007451 P(MPA)
	*	Civil II, Calendar I
v.	*	Judge Kelly A. Higashi
	*	
DISTRICT OF COLUMBIA OFFICE OF THE TENANT ADVOCATE,	*	
	*	
Respondent.	*	

ORDER GRANTING IN PART PETITION FOR REVIEW AND REMANDING FOR FURTHER CONSIDERATION

This matter comes before the court on Linda Sun's Amended Petition for Review of the Office of Employee Appeals' ("OEA's") October 13, 2017 Decision, the Respondents' opposition, Sun's reply thereto, and any supplemental briefing. The central issue raised by this petition is whether OEA erred in holding that the resolution of a 2012 lawsuit ("the District Court Action") filed by Linda Sun in the United States District Court of the District of Columbia to challenge her termination precluded Sun from subsequently raising another challenge to her termination before the Office of Employee Appeals in 2017 ("the 2017 OEA Proceeding"). For the reasons stated herein, the Court affirms the OEA decision in part and reverses in part.

Background

In 2007, Sun began working as a Program Support Specialist with the Office of the Tenant Advocate ("OTA"). Sun is a law school graduate, but she is not admitted to practice law in the District of Columbia or any other jurisdiction. Sun's supervisor at OTA grew concerned that Sun was engaging in the unauthorized practice of law, or that her activities may have created the appearance of such unauthorized practice, and directed Sun to take several corrective measures. Sun failed to comply with her supervisors' instructions and OTA terminated Sun in

2012 by issuing a Summary Removal Notice. Sun maintains that she was fired for retaliatory reasons. Whether Sun's termination was indeed wrongful is not before the Court.

2012 District Court Action

In 2012, Sun filed a claim in the United States District Court for the District of Columbia, *Sun v. District of Columbia Gov't, et al.*, Case No. 2012-CV-01919 (the "District Court Action").[1] Sun's Second Amended Complaint alleged the following claims: Wrongful Termination in Violation of Public Policy (Count 1), Retaliation in Violation of the District of Columbia Whistleblower Protection Act (Count 2), Discrimination in Violation of the District of Columbia Human Rights Act (Count 3), Wrongful Termination in Violation of Title VII of the Civil Rights Act of 1964 (Count 4), Breach of Contract (Count 5), Intentional Infliction of Emotional Distress (Count 6), and Assault (Count 7). Record at 16-26[2] (Second Amended Complaint in Case No. 2012-CV-01919).

The District Court entered summary judgment in favor of the District of Columbia on every count except Sun's assault claim. *See* R. at 124-144 (Order Granting Summary Judgment); *see also Sun v. District of Columbia et al.*, 133 F. Supp. 3d 155 (D.D.C. 2015). The Court held that Sun's common law wrongful termination claim (Count 1) failed because "plaintiff has not identified any other public policy that defendants are supposed to have violated." R. at 141. The Court reached this conclusion on the basis that "as an at-will employee ... plaintiff could have been fired 'at any time and for any reason, or for no reason at all.'" *Id.* at 141. The Court determined Sun's Whistleblower Protection Act claim (Count 2), District of Columbia Human Rights Act claim (Count 3), and Title VII claim (Count 4) in favor of the District of Columbia

[1] Sun first filed a charge with the Equal Employment Opportunity Commission ("EEOC") on March 21, 2012, to challenge the termination on the basis that OTA discriminated against her on the basis of race, sex, national origin, and retaliation. The EEOC issued Sun a letter confirming her right to institute a civil action, and she proceeded with the District Court Action.

[2] The Record is hereinafter cited as "R."

because plaintiff "failed to produce probative evidence to rebut defendants' legitimate nondiscriminatory reasons for her termination." R. at 140. The Court also rejected Sun's Breach of Contract (Count 5) and Intentional Inflection of Emotional Distress (Count 6) claims, but allowed the assault claim (Count 7) to go to a jury. R. at 142-43. A jury returned a verdict against Sun on her assault claim. *See* R. at 122 (Judgment on the Verdict for Defendant).

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the summary judgment decision. *See* R. at 34-35 (February 14, 2017 Judgment); *see also Sun v. District of Columbia Gov't*, 686 F. App'x 5 (D.C. Cir. 2017). The Court held that summary judgment was proper on the Title VII, District of Columbia Human Rights Act, and Whistleblower Protection Act claims because of Sun's failure "to produce evidence sufficient for a reasonable jury to find that the asserted reasons were not the actual reasons" for Sun's termination. R. at 34. With respect to the wrongful termination claim (Count 1), the Court of Appeals stated:

> the parties now agree that [Sun] was not an at-will employee. Thus, the common law claim of wrongful termination in violation of public policy is unavailable, and the District of Columbia Comprehensive Merit Personnel Act provides her sole remedy. *See Lewis v. D.C. Dep't of Motor Vehicles*, 987 A.2d 1134, 1137 (D.C. 2010).

The Court also affirmed the decision with respect to the IIED claim and rejected Sun's "procedural challenges to the jury trial on her assault claim." R. at 35.

2017 OEA Proceeding

On April 7, 2017, nearly a decade after her termination, Sun filed an appeal to the Office of Employee Appeals challenging the termination. *See* R. at 1-6. Sun alleged that her termination "was retaliatory and against the public policy of the DC Government." R. at 4. Sun explained that she had reported to her supervisor, Dennis Taylor, that the director of the Office of

Tenant Advocate, Johanna Shreve, "was still running her own company" in a supposed violation of policy or law, and that "I believe my termination was in retaliation for reporting Shreve's conflict of interest ...." Sun also alleged that her "Summary Removal Directive contained no facts to support the allegations." OTA asked OEA to dismiss the appeal on the grounds of *res judicata*.

Administrative Law Judge ("ALJ") Lim dismissed Sun's Petition for Appeal on October 13, 2017, for two reasons. First, ALJ Lim held that the doctrine of *res judicata* applied to Sun's claims because:

> all of the same claims against all of the same parties that [Sun] raises in this appeal were already adjudicated on their merits in Federal Court .... Employee instituted a civil action pursuing the same allegations that she is attempting to raise in this matter against the District, and any District employee, supervisor, or official having personal involvement in the prohibited personnel action.

ALJ Lim noted that the District Court had "supplemental jurisdiction under 28 U.S.C. § 1367" to adjudicate Sun's non-federal claims. ALJ Lim addressed Sun's argument, repeated here, that "the Federal Court had wrongly held that she was an at-will employee" and noted that the "Federal Court had adjudicated all her claims on their merits and thus afforded her all the same procedural rights as any Career Service employee would have ...." ALJ Lim further held that D.C. Code § 1-615.56 (a), which states that "The institution of a civil action pursuant to [D.C. Code] § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals" also barred Sun from seeking redress for matters already adjudicated in a civil action.

On November 3, 2017, Sun filed the instant Petition for Review. Sun asserts that she is "seeking a *de novo* review of the OEA dismissal." Petition at 2. Sun requests back-pay and reinstatement to her former position, or an equivalent position.

Standard of Review

In reviewing an administrative agency decision, this court must "base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Civ. R., Agency Review R. 1 (g). "[T]he burden of demonstrating error is on the appellant or petitioner who challenges the decision." *Hoage v. Board of Trustees of the Univ. of the District of Columbia*, 714 A.2d 776, 781 (D.C. 1998). The court must affirm an agency decision unless it is "arbitrary, capricious, or otherwise not in accordance with law"; the court "will not disturb an agency ruling as long as the decision flows rationally from the facts, and the facts are supported by substantial evidence in the record." *Providence Hosp. v. District of Columbia Dep't of Emp't Servs.*, 855 A.2d 1108, 1111 (D.C. 2004).

The court reviews findings of fact and mixed questions of law and fact under the "substantial evidence" standard, but applies "*de novo* review to the ultimate legal conclusions based on those facts." *Scolaro v. District of Columbia Board of Elections & Ethics*, 717 A.2d 891, 894 (D.C. 1998). The court will "defer to an agency's interpretation of a statute it administers unless that interpretation is unreasonable in light of the prevailing law, inconsistent with the statute, or plainly erroneous." *Office of the District of Columbia Comptroller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

Analysis

The court begins with a brief discussion of collateral estoppel and *res judicata*. "Collateral estoppel bars relitigation of an issue of fact or law when '(1) the issue is actually litigated; (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the

determination was essential to the judgment.'" *Walker v. FedEx Office & Print Servs.*, 123 A.3d 160, 164 (D.C. 2015) (quoting *Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999)). Under the doctrine of *res judicata*, "a prior judgment on the merits raises an absolute bar to the relitigation of the same cause of action between the original parties or those in privity" and bars "*not only those matters actually litigated but also those which might have been litigated in the first proceeding.*" *Goldkind v. Snider Bros., Inc.*, 467 A.2d 468, 473 n.10, 474 (D.C. 1983). With this legal backdrop in mind, the Court summarizes Sun's arguments.

Much of Petitioner's briefing seemingly argues the merits of her underlying claims already adjudicated by the District Court; the merits of these claims are not at issue in this petition. Otherwise, Sun argues that the District Court lacked jurisdiction over her claims, such that the doctrine of *res judicata* does not apply to preclude her from bringing similar claims before the OEA. Sun contends that the "CMPA provides the sole remedy for the wrongful termination claim which includes the whistleblower claim" and that "[i]f this Court finds the U.S. [D]istrict [C]ourt lacked jurisdiction over the state law claims, then res judicata and collateral estoppel do not apply." Mem. at 6. In her Reply, Sun further argues "without original jurisdiction the [F]ederal [C]ourt had no supplemental jurisdiction ..." and, therefore, res judicata would not apply.

OTA argues that "Petitioner's OEA Appeal was a clear attempt to re-litigate her claims regarding her termination from OTA" and refutes Sun's arguments that the District Court erred and lacked jurisdiction. OTA notes that the District Court "exercised supplemental jurisdiction over [Sun's] non-federal claims at [Sun's] behest." Opp'n at 15 (citing Sun's Second Am. Compl. in the 2012 Action, R. at 16). OTA argues that it is "undisputed that the Federal District Court had jurisdiction over [Sun's] Title VII claim" and that this federal question jurisdiction

therefore gave the court authority to "exercise supplemental jurisdiction over related state and common law claims." OTA argues that because the District Court had jurisdiction to hear Sun's claims, that adjudication has *res judicata* effect and precludes Sun from pursuing the same claims before OEA.

***

The gravamen of the petition is whether OEA erred in holding that the District Court case precluded Sun's claims before OEA either (1) on *res judicata* or collateral estoppel grounds, or (2) pursuant to D.C. Code § 1-615.54 (b). The Court finds that OEA did not err in so holding with respect to Sun's retaliation claim, but remands the case to OEA to evaluate in the first instance Sun's claim based on alleged violations of personnel regulations.

Any claim Sun could have brought in the District Court cannot be brought before the OEA, pursuant to the doctrine of *res judicata*. The District Court's decision constitutes a "prior judgment on the merits" of an action litigated by the same parties in this action. (Indeed, it appears that the District Court afforded Sun ample opportunity to litigate her claims on their merits, and even took the extraordinary step of appointing counsel for the limited purpose of assisting Sun in drafting her pleadings). The District Court clearly had jurisdiction over Sun's federal claims, and exercised supplemental jurisdiction over the related state law claims at Sun's request pursuant to 28 U.S.C. § 1367 (a). Therefore, the doctrine of *res judicata* applies to bar "not only those matters actually litigated but also those which might have been litigated in the first proceeding." *Goldkind v. Snider Bros., Inc.*, 467 A.2d 468, 473 n.10, 474 (D.C. 1983).

Importantly, however, as the Circuit Court noted, with respect to Sun's "claim of wrongful termination in violation of public policy":

> the parties now agree that appellant was not an at-will employee. Thus, the common law claim of wrongful termination in violation of public policy is

> unavailable, and the District of Columbia Comprehensive Merit Personnel Act provides her sole remedy. *See Lewis v. D.C. Dep't of Motor Vehicles*, 987 A.2d 1134, 1137 (D.C. 2010).

R. at 35; *Sun v. District of Columbia Gov't*, 686 F. App'x 5 (D.C. Cir. 2017). In *Lewis*, which the Circuit Court cited, the Court of Appeals held that a common law claim of "wrongful discharge" brought in the Superior Court was preempted by the CMPA and that the former employee's "sole recourse to challenge his termination was by appeal to the OEA, with judicial review by the Superior Court ...." *Lewis*, 987 A.2d at 113; *see also* D.C. Code § 1-606.03 (a) ("An employee may appeal ... an adverse action for cause that results in removal ... to the [OEA] ...."). The *Lewis* Court held that the "Superior Court had no jurisdiction" to address the former employee's common law wrongful termination claim. *Id.*[3]

Applied to this case, the holding in *Lewis* implies that the District Court had no jurisdiction to address any claim preempted by the CMPA; if the District Court lacked jurisdiction to hear such a claim, then the pursuit of such a claim before the OEA is not barred by the doctrine of *res judicata*. OEA considered Sun to be challenging her termination as "retaliatory and in violation of the public policy of the DC government." ID at 5 (apparently quoting the petition Sun submitted to the OEA, reported at R. 4). It is apparent that Sun's challenge of the termination as "retaliatory" is a reiteration of a claim she pursued before the District Court, "Count II – Retaliation in Violation of the District of Columbia Whistleblower Protection Act." Persuasive authority, which this Court finds compelling, provides that the CMPA does not preempt claims brought under the DC Whistleblower Protection Act and that the

[3] The CMPA does not preclude District employees from pursuing judicial relief for federal claims, such as the title VII claims at issue in the District Court Action. *Kelley v. District of Columbia*, 893 F. Supp. 2d 115, 119 n.1 (D.D.C. 2012); *Dickerson v. District of Columbia*, 70 F. Supp. 3d 311, 320 (D.D.C. 2014). Thus, the fact that Sun is subject to the CMPA did not preclude her from filing her federal claims and does not mean that the District Court lacked jurisdiction over those claims. Similarly, the CMPA does not preempt challenges based on alleged unlawful discrimination. *King v. Kidd*, 640 A.2d 656, 664 (D.C. 1993).

District Court may validly exercise jurisdiction over such a claim brought by an employee covered by the CMPA. *See, e.g.*, *Sharma v. District of Columbia*, 791 F. Supp. 2d 207, 216-17 (D.D.C. 2011); *Owens v. District of Columbia*, 923 F. Supp. 2d 241, 248-49 (D.D.C. 2013). Thus, the District Court had jurisdiction to hear Sun's retaliation claim and she is barred from pursuing such a claim before OEA.

The Court understands Sun's claim that she was terminated "against the public policy of the DC Government" to be a challenge to her termination under the CMPA. Indeed, regulations promulgated pursuant to the CMPA require that a summary removal notice state "[s]ufficient facts relied upon by the agency head to support the action[]," 16 DCMR 1616.3 (a), and the petition Sun filed before the OEA alleged that her "Summary Removal Directive contained no facts to support the allegations." R. at 5 (Sun's filing before the OEA); R. at 12 (February 21, 2012 Summary Removal Directive stating that a "written summary removal notice will be sent to you" stating the reasons for the removal within three days); R at 167-75 (February 24, 2012 Written Summary Removal Notice). Such a claim alleging violation of the CMPA could not have been pursued in the District Court Action, *Lewis*, 987 A.3d at 1137, and therefore Sun is not precluded by *res judicata* from pursuing this claim before OEA. Thus, OEA's finding that *this* claim was precluded was erroneous as a matter of law.

The OEA also held that "D.C. Code § 1-615.56(a) clearly and unequivocally precludes her appeal to this Office." Under that election of remedies provision, "institution of a civil action pursuant to [D.C. Code] § 1-615.54 shall preclude an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals …."[4] D.C. Code § 1-615.54 states that an "employee aggrieved by a violation of [D.C. Code] § 1-615.53 may bring a

[4] The Council added this provision with the Whistleblower Protection Amendment Act of 2009, which the Council passed as Act 18-0265 in 2010.

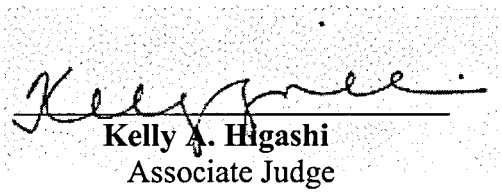
civil action against the District ...." In turn, D.C. Code § 1-615.53 prohibits a supervisor from taking "a prohibited personnel action or otherwise *retaliat[ing] against an employee because of the employee's protected disclosure* or because of an employee's refusal to comply with an illegal order." In other words, an employee may elect to file a civil action alleging retaliation, and the filing of such an action precludes the employee from pursing an administrative claim for the same cause of action before OEA. Thus, Sun's filing of a claim for retaliatory termination in the District Court precluded her from filing the same claim with OEA. The Court, therefore, affirms OEA's holding that any claim *for retaliation* was barred by *res judicata* and pursuant to D.C. Code § 1-615.56 (a).

For the reasons stated above, the Court reverses OEA's dismissal of the petition in part, and remands the petition to OEA to address Sun's CMPA claim. The Court expresses no opinion on whether the nine page February 24, 2012 Written Summary Removal Notice complies with the requirements of 16 DCMR 1616.3 (a), or whether any alleged violation of that regulation actually harmed Sun, as it falls to OEA to make such determinations in the first instance. To be clear, on remand, OEA will only consider Sun's allegation that her employer violated 16 DCMR 1616.3 (a), and Sun's arguments should address this and only this topic. Accordingly, it is this **9th** day of **October, 2019**, hereby

ORDERED that Linda Sun's Amended Petition for Review of the Office of Employee Appeals' October 13, 2017 Decision is **GRANTED IN PART**; and it is further

ORDERED that the October 13, 2017 Decision is **REVERSED IN PART** and **REMANDED** for further proceedings consistent with this **ORDER**; and it is further

ORDERED that this matter is **CLOSED.**



Kelly A. Higashi
Associate Judge
(Signed in Chambers)

COPIES TO:

Ryan Donaldson
Andrea Comentale
Lasheka Brown
Via CaseFileXpress

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

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DC FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT, **Petitioner,** **v.** **D.C. OFFICE OF EMPLOYEE APPEALS** **Respondent,** **v.** **SYLVIA JOHNSON** **Intervenor.**	**Case No. 2018 CA 000821 P(MPA)** **Judge José M. López**

ORDER

This matter comes before the Court in consideration of the District of Columbia Fire and Emergency Medical Services Department ("FEMS" or "Agency" or "Petitioner") Petition for Review of Agency Decision, filed on February 1, 2018. FEMS requests review of an Initial Decision on Remand issued by the Administrative Law Judge ("ALJ") in the District of Columbia Office of Employee Appeals ("OEA"), on December 12, 2017.

On June 27, 2018, the Court granted the Consent Motion to Intervene of Sylvia Johnson ("Intervenor" or "Ms. Johnson" or "Employee"). FEMS submitted a brief in support of its petition on June 28, 2018. In lieu of a brief, OEA submitted the ALJ's Initial Decision on Remand on July 16, 2018. After affording the parties some time to resolve the matter outside of Court, the Intervenor filed her Responsive Brief Opposing the Petition for Review on October 4, 2019. On Oct 22, 2019, FEMS filed a Motion to Strike Intervenor's Brief, which the Court granted in part on November 20, 2019. Specifically, the Court struck from the Intervenor's Brief Exhibit 3 and any arguments relying on Exhibit 3[1].

[1] Exhibit 3 of Intervenor's Responsive Brief contained an SF-50 that was not part of the Administrative Record.

The Court has considered FEMS's Brief, OEA's pleading relying on the ALJ's Initial Decision on Remand, and the Intervenor's Responsive Brief. For the following reasons, the Court grants the Petition, vacating and remanding the ALJ's Initial Decision on Remand.

BACKGROUND

The instant petition for review arose out of FEMS's termination of Sylvia Johnson as a Management Liaison Specialist during her probationary appointment for poor performance. *See generally* Petition for Review ("Pet."). Ms. Johnson's position as a Management Liaison Specialist commenced September 22, 2014 and concluded on August 15, 2015, for poor performance. *See generally* Pet.

Ms. Johnson previously worked for FEMS as a term employee. On June 1, 2009, Ms. Johnson was hired by FEMS as a Management Liaison Specialist. *See* Pet. Br. at 1. The offer letter indicated that she was selected for a Term Appointment with an effective date of July 20, 2009 and a not-to-exceed date of August 21, 2010. *See* Pet. Br. at 1; *see* Administrative Record ("A.R.") at 140. Ms. Johnson's tenure was subject to a probationary period of twelve (12) months to start on July 20, 2009. *See* A.R. at 140. Her appointment was contingent upon the availability of funding. *See* A.R. at 140.

On August 22, 2010, FEMS extended Ms. Johnson's term for an additional year, not to exceed September 21, 2011. A.R. at 143. Ms. Johnson's SF-50 informed her that "[a] term employee does not acquire permanent status on the basis of his/her term appointment." A.R. at 143. On September 22, 2011, FEMS, again, extended Ms. Johnson's term for another year not to exceed October 12, 2012. Once again, FEMS informed Employee of the temporary nature of her appointment. A.R. at 145. Then, on October 22, 2012, FEMS extended Ms. Johnson's term for an additional year, not to exceed July 13, 2013. A.R. at 147.

Around July 16, 2013, the designated Human Resources authority, at the time, Shawn Laster, submitted a Request for Superior Qualifications/Exceptions Form to the District of

Columbia Department of Human Resources; to request a six-month extension of Ms. Johnson's term appointment. A.R. at 149. The request was necessary as any further extension of Ms. Johnson's appointment would exceed the permitted four-year limit for term appointments. *See* A.R. at 151. On July 13, 2013, the request was granted and Ms. Johnson's term was extended to January 19, 2014. A.R. at 150. According to the SF-50 processed for the extension, Ms. Johnson's position remained a term appointment. A.R. at 151 ("A term employee does not acquire permanent status on the basis of his/her term appointment."). On January 20, 2014, FEMS extended Ms. Johnson's appointment for an additional two months, not to exceed March 30, 2014. A.R. at 153. On March 30, 2014, Ms. Johnson's position with FEMS terminated due to the expiration of the term appointment. A.R. at 155.

On June 24, 2014, Ms. Johnson was informed by FEMS that she had been selected for a Career Service Appointment as a Management Liaison Specialist. Petitioner's Br. at 2-3. Ms. Johnson applied for and competed for this position. Petitioner's Br. at 2-3. However, with the position came a probationary period of twelve (12) months, pursuant to D.C. Code § 1-608.01(a)(5). A.R. at 157-162. During the twelve-month probationary term, on August 12, 2015, FEMS terminated Ms. Johnson for poor performance, in accordance with Chapter 8, § 814 of the District Personnel Manual ("DPM"). A.R. at 164-172.

On September 21, 2015, Ms. Johnson filed an appeal of FEMS's decision to terminate her with the Office of Employee Affairs ("OEA"). A.R. at 1-22. In relevant part, Ms. Johnson contended that she was improperly terminated while on family and medical leave. A.R. at 1. Further asserting that she did not have to serve the probationary period because she was reinstated as a Career Service Appointment, effective September 22, 2014, after her time with FEMS between July 2009 and March 2014. A.R. at 1.

On October 30, 2015, FEMS filed a motion to dismiss the petition for appeal for lack of jurisdiction. A.R. at 35-45. FEMS contended that the OEA did not have jurisdiction over the

appeal because Ms. Johnson was terminated while serving her probationary period. A.R. at 37. Ms. Johnson filed an opposition to the motion on November 23, 2015, arguing that she did not need to undergo a probationary period because she was returning to FEMS after a break in service. A.R. at 50. The Administrative Judge ("ALJ") set a status conference for December 16, 2015. The status conference was held and the ALJ permitted Ms. Johnson to file a supplemental brief to address her jurisdiction argument. A.R. at 63. Also permitting FEMS to file an optional reply brief. A.R. at 63.

Ms. Johnson's supplemental brief was filed on January 19, 2016. A.R. at 67-69. Ms. Johnson cites to § 816.1[2] and § 816.2[3] of the DPM, to assert that she held a career service appointment and completed a probationary period when she worked for FEMS as a Management Liaison Specialist between June 2009 and March 2014. A.R. at 68. She pointed to the Notification of Personnel Action (SF-50) dated September 23, 2014, which made no mention that her appointment is probationary. A.R. at 70. Rather, box 5-B of the SF-50, Nature of Action contains "Reins-Career," which stands for "Reinstatement-Career Service Employment." A.R. at 67. Ms. Johnson's ultimate argument was that when she was hired by FEMS in September 2014 she was being reinstated as a career service permanent position and did not need to complete a probationary period, therefore her termination was improper. A.R. at 69.

FEMS filed its reply brief on January 29, 2016. A.R. at 71-4. FEMS contended that Ms. Johnson was mistaken in stating that the SF-50 does not mention that her appointment was probationary and that her previous employment with FEMS, between June 2009 and March

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[2] *See* DPM § 816.1 ("Except for a person who has a retreat right to a position in the Career Service as provided in chapter 9 and 10 of these regulations, a person shall have reinstatement eligibility for three (3) years following the date of his or her separation if he or she meets both of the following requirements:

(a) The person previously held a Career Appointment (Permanent); and

(b) The person was not terminated for cause under chapter 16 of these regulations.")

[3] *See* DPM § 816.2 ("A person having reinstatement eligibility under § 816.1 may be appointed competitively or noncompetitively to a position at a grade no higher than the grade last held under a Career Appointment (Probational) or a Career Appointment (Permanent) in the Career Service in a District agency, except that a reinstatement to a position with a promotion potential higher than the known promotion potential of the last position occupied shall be effected as provided in § 816.4.")

2014, was an ongoing temporary appointment, not a career appointment. A.R. at 71. FEMS pointed to box 5-D, Legal Authority, stating "Probational or Perm Appt." A.R at 70. Furthermore, FEMS argued that Ms. Johnson mischaracterizes her prior employment status with FEMS as a career service appointment although she was a temporary appointment. A.R. at 72-73.

Initial Decision

On February 11, 2016, the ALJ issued the Initial Decision granting FEMS's motion to dismiss and finding that jurisdiction of the OEA had not been established. A.R. at 82. The ALJ determined that FEMS did not intend to deceive Ms. Johnson regarding the status of her employment when hired in September 2014, rather that FEMS made an "errant remark." A.R. at 83. Furthermore, the ALJ determined that between June 2009 and March 2014, Ms. Johnson's position as a Management Liaison Specialist with FEMS was classified as a term appointment, that was extended a number of times. Ultimately finding that Ms. Johnson was not eligible for reappointment under § 816 of the DPM. A.R. at 83. Moreover, the ALJ determined that due to the break of employment, between March 2014 and September 2014, Ms. Johnson would have regardless been subject to completing a probationary period in accordance with § 813 and § 813.8 of the DPM.

On March 17, 2016, Ms. Johnson filed a Petition for Review of the ALJ's Initial Decision to the OEA Board ("the Board"), contending that the ALJ mischaracterized Ms. Johnson's initial appointment as a 'term appointment' because pursuant to District Personnel Regulations (DPM)[4] §§ 823.2[5] and 823.8[6], Ms. Johnson was automatically converted to a Career Service

[4] The DPR is the same document as the DPM and for the remainder of this order the Court will continue to use DPM to refer to the regulation.
[5] *See* DPM § 823.2 ("Unless supported by grant funds, an employee continuously serving in a term appointment four (4) years or more, which is acquired through open competition, shall. . . [h]ave his or her position converted to a regular Career Service appointment with permanent status.").
[6] *See* DPM § 823.8 ("An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment, unless the initial term

Appointment on or about July 21, 2013; since her term appointment exceeded the maximum four (4) years a term appointment could run. A.R. at 89, *see* DPM § 823 (defining 'term appointment' as "[a] personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less."). FEMS filed a reply to the Petition for Review on April 19, 2016, arguing that the ALJ did not commit reversible error because the SF-50's related to Ms. Johnson's term appointment period, between July 2009 and March 2014, all clearly indicate that the nature of her employment was a series of term appointments. A.R. at 95. FEMS also asserts that the ALJ correctly determined that in accordance with DPM § 813 and § 813.8[7] that because there was a five month break between Ms. Johnson's employment with FEMS; therefore, regardless she was required to complete a one year probationary period. A.R. at 96.

The OEA Board Decision

The Board issued its Opinion and Order on Ms. Johnson's Petition for Review on June 6, 2017. The Board remanded the matter as it was unable to rule that the ALJ's decision was based on substantial evidence in the record. A.R. at 111. The Board stated it was unable to determine if the requirements of DPM § 823.2 had been met. Specifically, that it could not determine if Ms. Johnson's employment with FEMS between July 20, 2009 through March 30, 2014 was continuous. A.R. at 110. The Board also highlighted language in the July 20, 2013 SF-50 that suggests FEMS may have intentionally extended Ms. Johnson's appointment passed the four-year limit ("extension of term appointment beyond four-year limit approved by DCSF-11B-10 dated 07/30/2013"). A.R. at 110. Thus, the matter was remanded for the ALJ to determine

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appointment was through open competition within the Career Service and the employee has satisfied the probationary period.").

[7] *See* DPM § 813.8 ("Except when the appointment is effected with a break in service of one (1)-workday or more, or as specified in subsection 812.2(a) of this chapter or subsection 813.9 of this section, an employee who once satisfactorily completed a probationary period in the Career Service shall not be required to serve another probationary period.")

whether Ms. Johnson "converted from a term employee to a Career Service permanent employee." A.R. at 111.

Initial Decision on Remand

On December 12, 2017, the ALJ issued an Initial Decision on Remand reversing Ms. Johnson's termination. The ALJ was tasked with resolving (1) whether Ms. Johnson's term appointment was acquired through open competition; and (2) whether Ms. Johnson's term appointment was converted to a Career Service Appointment with permanent status, pursuant to DPM § 823.2, after she continuously served in a term appointment for more than four years.[8]

First, the ALJ determined that Ms. Johnson's term appointment was acquired through open competition based upon the July 20, 2009, SF-50, "Box 34" that indicates that Ms. Johnson occupied her position through "Competitive Service." A.R. at 187. Second, the ALJ determined that Ms. Johnson's term appointment "was required to be converted to a regular Career Service Appointment with permanent status," in July of 2013, pursuant to DPM. A.R. at 187. The ALJ's decision was based upon Ms. Johnson's position not being supported by a grant funds, her position being acquired through open competition, and that she served continuously for more than four years under numerous term appointments. A.R. at 187. The ALJ found that Ms. Johnson was reinstated as a Career Service appointment with permanent status when rehired by FEMS in August/September 2014 and could only be removed for cause. A.R. at 189. Therefore, the ALJ reversed Ms. Johnson's termination and ordered FEMS to reinstate her to the same or comparable position and reimburse her for all back-pay and benefits lost. A.R. 188.

The Petition for Review

Following the issuance of the ALJ's decision, FEMS filed the instant Petition with this Court. *See generally* Pet.; *see also* Pet. Br. In its brief, FEMS raises two contentions as to why the ALJ's Initial Decision on Remand is erroneous and should be vacated. First, FEMS contends

[8] The ALJ noted that Ms. Johnson "asserted for the first time in her Petition for Review, to the Board, that her position was converted to a Career Service (Permanent) status, pursuant to DPM § 823. . . ." A.R. at 186, n. 7.

that the ALJ's Initial Decision on Remand should be vacated because the ALJ relied upon the incorrect version of the DPM. Pet. Br. at 6. Specifically, that the ALJ made his ruling based upon the language of DPM § 823.2[9] in the current version; which was amended in December of 2014, several months after Ms. Johnson's final term appointment expired. Pet. Br. at 6. FEMS asserts that Ms. Johnson was not guaranteed a conversion to a permeant appointment because the applicable section of the DPM, at the time Ms. Johnson's term appointment expired and when she was hired in August/September 2014, states that "[t]erm appointments may be extended beyond the four (4) year limit with prior approval of the personnel authority." DPM §§ 823.1, 823.2 (effective April 7, 2000, amended December 5, 2014). Ms. Johnson does not provide a response to this contention.[10]

Second FEMS, contends that the ALJ erroneously determined that Ms. Johnson competed for her initial term appointment because there was "no evidence to support the Employee ever competed for her initial appointment in the record from OEA." Pet. Br. at 7. FEMS argues that the ALJ's reliance on the July 20, 2009, SF-50, "Box 34" that indicated that Ms. Johnson occupied her position through "Competitive Service," was a factual conclusion because "Box 34" "only means that the position is in the Career Service, not that [Ms. Johnson] was hired subject to open competition for her position." A.R. at 7. Rather, FEMS argues that Ms. Johnson did not meet her burden of proving her initial term appointment was obtained through open competition because the record did not contain evidence of such. Pet. Br. at 7-8. FEMS then suggests that open competition could be evidence by "a Selection Certificate that documents the individuals considered for a position and the individual selected," or an "offer letter stating, 'as a

[9] DPM § 823.2 states that "[u]nless supported by grant funds, an employee continuously serving in a term appointment four (4) year or more, which is acquired through open competition, shall:

(a) Be separated from District government services; or
(b) Have his or her appointment converted to a regular Career Service appointment with permanent status."

[10] The Court previously ruled, on November 20, 2019, that it could not accept Ms. Johnson's response to this contention as she relies upon a document not included in the Administrative Record. *See* Order Granting in Part Petitioner's Motion To Strike Intervenor's Brief.

result of Vacancy Announcement #. . .'" Pet. Br. at 7. In response, Ms. Johnson argues that under the 2000 or older version of the DPM, § 823.2 "is not the only provision which justifies the conclusion reached by the ALJ." Intervenor's Br. at 1. Ms. Johnson contends that § 816 of the 2000 version DPM supports that when she secured her position as a Management Liaison Specialist in September 2014, she obtained the position as a Career Appointment. Intervenor's Br. at 2-3; *see* DPM § 816.4 ("All other reappointments of former career service employees shall be processed competitively.").

STANDARD OF REVIEW

When reviewing a decision from an administrative agency, there is a "presumption of correctness of the agency's decision" and the burden is placed on the petitioner to demonstrate agency error. *See Cooper v. District of Columbia Dep't of Employment Servs.*, 588 A.2d 1172, 174 (D.C. 1991). The Court may not set aside an agency decision if it is "supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." *See* Super. Ct. Civ. R. Agency Review 1(g). If substantial evidence supports the agency's findings, the Court must affirm the agency decision even though contrary evidence may also exist in the record. *See Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995). "The corollary of this proposition, however, is that we are not obliged to stand aside and affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law." *See Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161, 1166 (D.C. 1991).

ANALYSIS

The first issue to be resolved on appeal is whether the ALJ properly concluded, as a matter of law, that Ms. Johnson was converted to a Career Service Appointment in 2013 after her Term Appointments exceeded four-years, when he relied upon § 823 of the 2014 version of the DPM that was not in effect at the time Ms. Johnson was terminated in March 2014 and then later

hired in September 2014? The Court finds that the ALJ's findings are not supported as a matter of law because the language of § 823 of the 2014 DPM was not in effect at the time Ms. Johnson was terminated in March 2014 and then hired by FEMS in September 2014. The parties and the ALJ should have relied on and used the regulations of the 2000 version of the DPM to resolve the issues surrounding Ms. Johnson's term appointment and conversion to a career appointment in determining her appointment status when hired in September 2014. Furthermore, the Court has some concern that the ALJ's Initial Decision relied upon the 2014 version of the DPM. For example, the Initial Decision relies on and cites to DPM §§ 816.1, 813, and 813.8. A.R. at 82-3. The Court asks the ALJ to ensure that his Initial Decision was based upon language found in the 2000 version of the DPM and is not tainted by differing language found in the 2014 version of the DPM.

Both the Petitioner and Intervenor ask this Court to consider substantive arguments and make factual findings using the 2000 version of the DPM. However, this Court is not permitted to make findings on issues the ALJ did not address. *See Cooper v. District of Columbia Dep't of Employment Servs.*, 588 A.2d 1172, 1176 (D.C. 1991) ("We cannot . . . make findings on issues which the agency did not address."). Therefore, the Court remands this issue to the ALJ to reconsider the Petitioner and Intervenor's arguments and evidence using the 2000 version of the DPM. Moreover, it is within the ALJ's discretion to determine if there is sufficient evidence in the record to render his decision using the 2000 version of the DPM or if he will permit the parties to introduce new evidence.

The second issue on appeal is whether the ALJ's conclusion, that Ms. Johnson's initial term appointment, in July 2009, was obtained through open competition, is based on substantial evidence? The Court finds that the ALJ's determination was based upon substantial evidence. The ALJ determined that Ms. Johnson's term appointment was acquired through open competition based upon the July 20, 2009, SF-50, "Box 34" that indicates that Ms. Johnson

occupied her position through "Competitive Service." A.R. at 187. The ALJ's reliance on an official employment action form is not misplaced or conclusory as argued by Petitioner. Though the Petitioner offers some alternative documents the ALJ could have also relied upon, this Court finds that an official document prepared by human resources is sufficient. Therefore, the ALJ's determination remains undisturbed.

Accordingly, it is this 2nd day of April, 2020, hereby

ORDERED that the ALJ's Initial Decision on Remand is **VACATED** and **REMANDED** to the ALJ to issue a new Initial Decision on Remand using the 2000 version of the DPM in resolving whether Ms. Johnson's Term appointment was converted to a regular Career Appointment with permanent status.

Judge José M. Lopez
Superior Court of the District of Columbia

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

D.C. DEPARTMENT ON DISABILITY SERVICES **Petitioner,** **v.** **DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS** **Respondent,** **&** **CHARIS TONEY** **Intervenor.**	**Case No. 2018 CA 002192 P(MPA)** **Judge John M. Campbell**

ORDER

This is before the Court on the District of Columbia Department on Disability Services' Petition for Review of Agency Decision, pursuant to Super. Ct. Agency Rev. R. 1. For the reasons stated below, the Court **VACATES** and **REVERSES IN PART** the decision of the District of Columbia Office of Employee Appeals.

I. BACKGROUND

Intervenor Charis Toney ("Ms. Toney") began working at the District of Columbia Department on Disability Services ("DDS" or "Petitioner") as a Vocational Rehabilitation Specialist on February 10, 2014. R. at 109. On September 24, 2015, Ms. Toney submitted a D.C. Government Family and Medical Leave Application Form requesting 160 hours of Paid Family Leave ("PFL"), from November 10, 2015 to December 10, 2015. R. at 77. Ms. Toney submitted the form to Rachel Phillips, the DDS Human Resources Specialist, who was responsible for

processing PFL and Family Medical Leave Act ("FMLA") applications. R. at 571-593. As PFL is used when an employee is caring for a family member, Ms. Phillips instructed Ms. Toney to specify to whom care would be provided and an estimated time of leave needed. R. at 571-643. In Section II of the form, Ms. Toney indicated that she would be caring for her mother, Karen B. Toney, and stated that she would provide "as much care as needed for as long as needed." R. at 78.

Section III of the application form was required to be completed by the patient's healthcare provider. R. at 79. Dr. Abbaa Sarhan, MD, one of Ms. Toney's physicians at Columbis Fertility Associates ("CFA"), completed Section III of the form. *Id.* The form indicated that the patient would undergo surgery on November 10, 2015, and stated that the patient would be recovering from surgery from November 10, 2015, to December 10, 2015. R. at 78-81. A section asking whether the patient would require care on an intermittent or reduced schedule basis, including recovery time, was marked "yes." R. at 80. Section III of the form was signed by Dr. Sarhan and dated November 2, 2015, and a copy of the form was submitted to DDS on or around the same day. R. at 587.

On November 6, 2015, Ms. Toney contacted Ms. Phillips to ask about the status of her PFL application. R. at 84, 590-93. On November 9, 2015, when Ms. Phillips learned that Ms. Toney had surgery the next day, Ms. Phillips noted a discrepancy in Ms. Toney's PFL request and asked Ms. Toney if the requested leave was for herself or for her mother. *Id.* Ms. Phillips conferred with her supervisor, Gria Hernandez, and contacted Ms. Toney's doctor's office. R. at 961. The doctor's office informed DDS that Ms. Toney, rather than her mother, was receiving care. *Id.* Ms. Hernandez then informed Ms. Toney that PFL cannot be used for one's self, and Ms. Phillips voided Ms. Toney's PFL application form R. at 77, 578. Later that day (November

9), Ms. Toney submitted a D.C. FMLA form for a "personal health condition," seeking to use sixty hours of annual leave and sixty hours of sick leave. R. at 87. This FMLA application included the Section III medical certification completed by Dr. Sarhan, and was signed by Ms. Phillips on November 12, 2015. R. at 88, 89-92. DDS sent Ms. Toney a letter approving her application for medical leave under the District of Columbia Family and Medical Leave Act of 1990 ("DCFMLA") from November 10 until December 10, 2015.R. at 93-94. The letter also instructed Ms. Toney to submit a return to work letter from the same physician who certified her DCFMLA absence. *Id.*

Upon her return to work on December 8, 2015, Ms. Toney emailed Ms. Phillips the required return to work notice, signed by Dr. Safa Rifka, Ms. Toney's primary care physician at CFA. R. at 103. After contacting CFA directly to obtain original copies of both the Section III medical certification and the return to work notice, Ms. Phillips and Ms. Hernandez noted discrepancies between the forms directly from CFA and the forms Ms. Toney submitted to DDS. R. at 604-612. On the Section III medical certification completed by Dr. Sarhan, the end date for the period of incapacity had been changed from November 17, 2015 in the original form to December 10, 2015 in the form submitted to DDS. R. at 80, 106. Further, medical facts in the Section III form submitted to DDS were whited-out, and the original form from CFA indicated that Ms. Toney would *not* need care on an intermittent or reduced schedule basis, contrary to the submitted form. R. at 79-80, 105-106 (emphasis added). On the return to work form completed by Dr. Rifka, the original form stated that Ms. Toney would be under her physician's care from November 10 to December 1, 2015. R. at 108. However, the return to work form submitted by Ms. Toney to DDS indicated that she was under her physician's care from November 10 to December 8, 2015. R. at 103.

Ms. Hernandez began an investigation against Ms. Toney on February 11, 2016, based on the allegation that "[Ms. Toney] appears to have forged the medical certification page of her FMLA application." R. at 109, 662. After interviewing Ms. Toney and reviewing all forms associated with her FMLA application, Ms. Hernandez concluded in the "Record of Supervisory Investigation/Inquiry and Recommendation(s) for Action Re: Charis Toney" that Ms. Toney had fraudulently altered the Section III medical certification and the return to work notice, and recommended a thirty-day suspension. R. at 109-110. On March 7, 2016, Ms. Hernandez notified Ms. Toney of her upcoming suspension with a written Advance Written Notice of Proposed Suspension of 30 Days ("Advance Notice"). R. at 142-47. The Advance Notice identified three charges of adverse action under Section 1605.4(b) of Chapter 16 of the District Personnel Manual ("DPM"):

(1) False Statements, including: Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter ("Charge One"). *See* § 1605.4(b)(2).
(2) False statements, including: Knowingly and willfully reporting false or misleading information or purposefully omitting material facts to any supervisor ("Charge Two"). *See* § 1605.4(b)(4).
(3) Unauthorized absences of five (5) workdays or more ("Charge Three"). *See* § 1605.4(f)(2).

The Advance Notice explains that Charge One was brought because "the dates on both the [Section III] medical certification and the return to work notice were changed," and because Ms. Toney admitted to "whiting out and changing the forms on at least two occasions prior to submitting them." R. at 142-43. Charge Two is based on Ms. Toney's "false statements during the course of the [DDS] investigation;" Ms. Toney "denied forging the documents," and when confronted with evidence of the altered forms, she "insisted that [she] did not know why the dates were different." R. at 144. On May 5, 2016, Deborah Bonsack, DDS Deputy Director of Administration, issued a Final Decision on the Proposed Suspension of 30 days ("Final

Decision"). In the Final Decision, Ms. Bonsack sustained Charges One and Two and the proposed thirty-day suspension, and dismissed Charge Three on unauthorized absences.

On June 8, 2016, Ms. Toney appealed the Final Decision to OEA. R. at 186-234. The matter was assigned to an administrative judge ("ALJ"), who reviewed the parties' supplemental briefs and held an Evidentiary Hearing on October 27, 2017. R. at 451, 458. On February 21, 2018, the ALJ issued an Initial Decision that reversed DDS' fifteen-day suspension under Charge One and upheld the fifteen-day suspension under Charge Two. R. at 971-72. With respect to Charge One, the ALJ considered testimony from Dr. Rivka, in which he stated that he had verbally given Ms. Toney permission to extend her return to work until December 8, 2015, and redact any information that might violate her privacy protections. R. at 970. Therefore, because Ms. Toney had authorization to alter her return to work notice, the ALJ found that DDS had failed to meet its burden of proof by a preponderance of the evidence on Charge One. *Id.* Conversely, the ALJ found that Dr. Sarhan had not given Ms. Toney verbal consent to change medical incapacity dates on the Section III form, and found that DDS had not met its burden of proof on Charge Two. *Id.* The ALJ thus appears to have read Charge One as pertaining to the return to work notice, and Charge Two as pertaining to the Section III medical certification of the original PFL application. DDS subsequently appealed the Initial Decision to this Court.

II. STANDARD OF REVIEW

The Superior Court has jurisdiction to review a final decision of a District of Columbia agency. *See* Super Ct. Agency Rev. R. 1. The Court is prohibited from substituting its judgment for that of the agency. *Kegley v. District of Columbia*, 440 A.2d 1013, 1018 (D.C. 1982) (citing *Jones v. Police and Firemen's Retirement and Relief Board*, 375 A.2d 1 (D.C. 1977)). Rather, the Court generally gives deference to decisions rendered by administrative agencies. *Am. Broad.*

Cos., Inc. v. District of Columbia Dep't of Employment Servs., 822 A.2d 1085, 1088 (D.C. 2003) (citing *Springer v. District of Columbia Dep't of Employment Servs.*, 743 A.2d 1213 (D.C. 1999)). This is done by examining the administrative record "to determine if there has been procedural error, if there is substantial evidence in the record to support the action of the agency, or if the action is in some manner otherwise arbitrary, capricious, or an abuse of discretion." *Kegley*, 440 A.2d at 1019. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Larry v. Nat'l Rehab. Hosp.*, 973 A.2d 180, 183 (D.C. 2009) (citing *Rodriguez c. Filene's Basement Inc.*, 905 A.2d 177, 180-81 (D.C. 2006)).

Further, it is not the Court's function to retry the facts or rehear the evidence. *Hahn v. Univ. of the Dist. Of Columbia*, 789 A.2d 1252, 1256 (D.C. 2002) (quoting *Shephard v. District of Columbia Dep't of Employment Servs.,* 514 A.2d 1006, 1010 (D.C. 1986)). The Court will normally defer to the agency's decision, if the findings flow "rationally from the facts" and are "supported by substantial evidence." *Am. Broad. Cos., Inc.*, 822 A.2d at 1089 (citing *Washington Post Co. v. District Unemployment Compensation Bd.*, 377 A.2d 436, 439 (D.C. 1977)).

III. ANALYSIS

This Court finds that the OEA's Initial Decision is not supported by substantial evidence in the record. Therefore, the Initial Decision should be vacated and reversed as to Charge One, and the associated fifteen-day suspension should be reinstated.

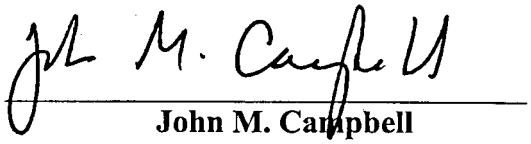
Petitioner argues that OEA erred in relying solely on Dr. Rifka's testimony in finding that DDS did not have cause with respect to Charge One against Ms. Toney. Pet'rs Br. 10. This Court agrees. Though Ms. Toney argues in the Intervenor's Brief that "[Charge One] is premised upon [Ms. Toney's] admitted alteration of dates on the return to work notice and [Charge Two] is

premised upon the medical incapacitation date change in Section III of [Ms. Toney's] medical form," this argument is not supported by the evidence in the record. Opp'n 10. In the Advance Notice informing Ms. Toney of the charges brought against her, Charge One, "making false statements of a material fact on an official matter," was explicitly based upon Ms. Toney's alteration of dates "on both the [Section III] medical certification and the return to work notice." R. at 142-43. Charge Two, "making false statements to any superior," was not based upon Ms. Toney's alteration of the two forms, but on her alleged "false statements during the course of the [DDS] investigation." R. at 144.

In the Initial Decision, the OEA only considered the return to work notice when analyzing Charge One, and found that DDS had not met its burden of proof for that cause of action because Dr. Rifka had given Ms. Toney permission to alter the form. R. at 964, 969-970. Further, the OEA only considered the Section III medical certification with regard to Charge Two, and affirmed DDS' decision on that cause of action because Dr. Sarhan did not give Ms. Toney permission to alter the certification. R. at 963, 970. The OEA's finding on Charge One does not flow "rationally from the facts" in the record. *Am. Broad. Cos., Inc.*, 822 A.2d at 1089 (citing *Washington Post Co.* 377 A.2d at 439). The Advance Notice clearly indicates that Charge One was brought pursuant to Ms. Toney's alteration of *both* forms, and the record evidence shows that Ms. Toney did not have permission to alter the Section III medical certification. R. at 142-43, 963. This Court finds that the OEA should have considered Ms. Toney's alteration of both forms when ruling on Charge One, and therefore should have found that DDS met its burden of proof by a preponderance of the evidence on that cause of action. Therefore, because the OEA's finding on Charge One is unsupported by substantial evidence, it is this 1st day of November, 2019, hereby

ORDERED, that the decision of the District of Columbia Office of Employee Appeals is **VACATED** and **REVERSED IN PART** as to Charge One; and it is further

ORDERED, that the Status Hearing scheduled for November 8, 2019 is **VACATED**.



John M. Campbell
Associate Judge

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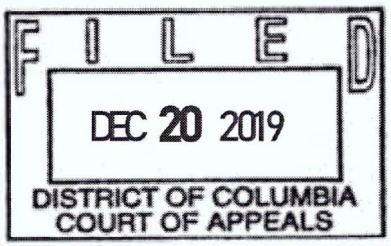
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-253

HAROLD DARGAN, APPELLANT,

v.

D.C. OFFICE OF EMPLOYEE APPEALS, ET AL., APPELLEES.



Appeal from the Superior Court
of the District of Columbia
(CAP8873-15)

(Hon. Maurice A. Ross, Trial Judge)

(Argued November 13, 2019 Decided December 20, 2019)

Before BECKWITH and EASTERLY, *Associate Judges*, and RUIZ, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Harold Dargan was removed from his position as a D.C. Fire and Emergency Medical Service Department ("FEMS") Basic Paramedic, Series DS699, Grade 8, for failing to maintain his D.C. Department of Health ("DOH") certification as required by FEMS Bulletin No. 83. On review of that decision, the Office of Employee Appeals ("OEA") Administrative Law Judge ("ALJ") concluded that FEMS (1) complied with the ninety-day time limit for commencing a corrective or adverse action against an employee under D.C. Code § 5-1031(a) (2019 Repl.); and (2) removed Mr. Dargan from service "in accordance with applicable law, rule, or regulation," which the OEA identified as encompassing the certification testing requirements of Bulletin No. 83. Mr. Dargan sought review of that decision from the Superior Court and now appeals to this court. We reverse and remand.

We review an OEA ALJ's decision as though the appeal was brought directly to us. *Jahr v. District of Columbia Office of Emp. Appeals,* 19 A.3d 334, 340 (D.C. 2011). "An OEA decision must state findings of fact on each material contested factual issue" and "those findings must be supported by substantial evidence." *Id.* (internal quotation marks omitted). The "OEA's conclusions of law

must follow rationally from its findings" and may be reversed only if they are "arbitrary, capricious, or an abuse of discretion." *Id.* (internal quotation marks omitted).

Mr. Dargan challenges both the OEA ALJ's procedural and substantive rulings. For reasons we will explain, we consider the OEA ALJ's substantive ruling first. The OEA ALJ determined that FEMS terminated Mr. Dargan "in accordance with applicable law, rule, or regulation" because (1) Bulletin No. 83 requires that all FEMS Emergency Medical Technicians ("EMTs") "maintain their certification by the National Registry of EMTs [("NREMT")]"; (2) the NREMT "certification exam requires passage of psychomotor (practical skills) examination"; (3) Bulletin No. 83 allows EMT-Intermediate/99 candidates "three full attempts to pass the psychomotor examination" of the NREMT exam; and (4) Mr. Dargan failed the psychomotor examination on September 28, 2011, February 2, 2012, and February 14, 2012.

To begin with, it is far from clear that substantial evidence supports the OEA's determination that Mr. Dargan was administered the psychomotor exam of the NREMT on any of the three dates specified by the OEA.[1] But even if it had been, it is unclear why such testing would be relevant to this case, where Mr. Dargan was terminated, not for failing to maintain his NREMT certification (which, as the OEA ALJ found, was still current at the time of his termination), but rather for failing to maintain his DOH certification, which presumably has different procedures and requirements. Bulletin No. 83, entitled "National Registry of EMTs ("NREMT") Certification Policy," issued in 2010, set forth the procedures for the new obligation adopted in 2009 for all emergency services providers to maintain NREMT certification in addition to DOH certification: "All

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[1] The record includes no documentation from a September 28, 2011 "examination," and in the parties' Joint Statement of Agreed Upon Material Facts, they state only that on September 28, 2011, "the Medical Director [of FEMS] evaluated the Employee," "checked the box 'Return to Mentor,'" and "not[ed] 'Close eval of ability to function in field. Need FISDAP for full release. Re-assessment. Will always []be ACA only under new paramedic partner." Likewise, the documentation of the "interviews" from February 2 and 14, 2012, gives no indication that they were in connection with the NREMT exam. Neither Mr. Dargan's final decision of termination nor his advance notice indicated that NREMT testing was conducted on any of these dates.

DC Fire and EMS Department employees will be required to . . . maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification." But the testing procedures of Bulletin No. 83 by their plain language apply only to the former certification, not the latter: Bulletin No. 83 explains that FEMS "will make reasonable efforts to ensure that each employee will complete the National Registry certification process" within a certain timeframe and then details the "components" of the NREMT examination—the cognitive (written) examination and the psychomotor (practical skills) examination—and the "policies" for the administration of these components.[2]

Remand is required to determine (1) what procedures, if any, should have been followed to deny Mr. Dargan DOH recertification before terminating Mr. Dargan for not having a current DOH certification,[3] and (2) whether these

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[2] It is additionally unclear whether Bulletin No. 83's testing procedures apply to NREMT *re*certification, but we need not resolve that question in this case since, as noted above, Mr. Dargan's NREMT certification was current.

[3] By turning to and applying the process articulated in Bulletin No. 83, the OEA ALJ apparently thought Mr. Dargan could not be terminated unless some procedure had been followed to deny him DOH recertification. Perhaps Bulletin No. 83's requirements regarding NREMT certification procedures also apply to DOH recertification. But if that is the case, the OEA needs to explain why this is so. Alternatively, it may be that there is another source of authority governing DOH recertification. Possible candidates are D.C. Code § 7-2341.15(b) (2018 Repl.) (authorizing the mayor, "subject to the right to a hearing as provided in § 7-2341.17" to deny, inter alia, "renewal of . . . a certification to perform duties of emergency services personnel" in enumerated circumstances), and the relevant regulations regarding EMS recertification, *see generally* 29 DCMR §§ 500–599 (2019), in particular 29 DCMR § 563.17(z) ("Sufficient grounds for denial, suspension, or revocation of certification granted to an emergency medical services provider . . . shall include: Withdrawal of sponsorship by the sponsoring medical director."). The OEA ALJ did not reference these statutory and regulatory provisions, but Mr. Dargan did allude to them in his brief to the OEA ALJ. While focusing on Bulletin No. 83 above the line, in a footnote, he stated that:

> The DOH has instituted a complex appeals process if it denies certification or recertification, but it is doubtful (1) it would be permitted in the case of the District of Columbia for the reasons

(continued...)

procedures were followed in Mr. Dargan's case.[4] Because the answer to these questions could impact whether Mr. Dargan was given proper notice of an adverse action under D.C. Code § 5-1031, i.e., whether FEMS denied him notice of a decision not to recertify him, if he was entitled to such separate notice, we remand that issue to the OEA as well.[5]

For the foregoing reasons, we vacate the judgment and remand the case to the Superior Court with directions to remand it to OEA for further proceedings consistent with this order.

(...continued)

> discussed above and (2) it would provide meaningful review in the circumstances existing here. 29 DCMR 564[.]

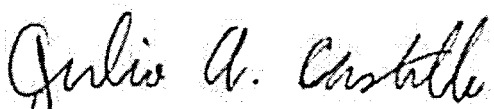
The meaning and import of this footnote is unclear to us and may be explored on remand.

[4] Mr. Dargan represented in his brief to the OEA ALJ that he had submitted his DOH certification application on May 30, 2012. Pursuant to 29 DCMR § 521.1, such applications must be submitted to the Medical Director. As noted above, see *supra* note 3, the decision by a medical director to withdraw sponsorship appears to be possible grounds for "denial, suspension, or revocation" of DOH certification. 29 DCMR § 563.17(z). But here, a July 3, 2012, letter from DOH to the Medical Director states that Mr. Dargan's DOH certification had lapsed on June 30, 2012, "with no application of renewal pending." Assuming the FEMS Medical Director did not transmit Mr. Dargan's DOH recertification application to DOH, the question is whether he had acted within his authority to withhold Mr. Dargan's application or whether he should have nonetheless submitted Mr. Dargan's application to DOH. As a factual matter, there is no information in the record about if, when, or why a decision was made not to transmit Mr. Dargan's application to DOH, although there is ample evidence that the FEMS Medical Director was dissatisfied with Mr. Dargan's skills before his DOH certification lapsed. Adding to the mystery, the Medical Director requested that DOH *de*certify Mr. Dargan on June 25, 2012, giving the impression that he did not anticipate the expiration of Mr. Dargan's DOH certification five days later on June 30, 2012.

[5] We agree that if FEMS's notice obligation was not triggered until the date Mr. Dargan's DOH certification lapsed, then FEMS's notification was timely under the statute.

It is so ordered.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

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Director, Civil Division
QMU

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James C. McKay, Jr., Esquire
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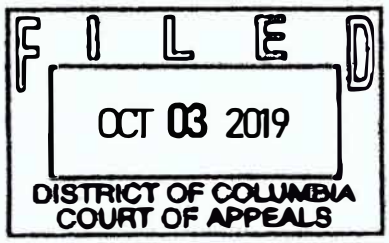
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-246

BELYNDA ROEBUCK, APPELLANT,

v.

DISTRICT OF COLUMBIA OFFICE ON AGING, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CAP-6472-15)

(Hon. Jennifer A. Di Toro, Trial Judge)

(Submitted May 10, 2018 Decided October 3, 2019)

Before GLICKMAN and MCLEESE, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant, Belynda Roebuck, is an ex-employee of the Office on Aging. The Office terminated her upon finding she had broken the law while in its employ by falsely certifying she was out of work so she could collect unemployment compensation benefits. Her termination was upheld by the Office of Employee Appeals (OEA) and, on further review, by the Superior Court. But because the record fails to show that the Office on Aging properly considered relevant, mitigating factors in selecting the appropriate penalty to impose on Ms. Roebuck, as it was required to do under settled precedent, we must reverse the decision and remand for further proceedings.

I.

Ms. Roebuck started working full-time at the Office on Aging on August 30, 2010. Due to an error in recording her start date in the payroll system, her initial paycheck was delayed, and she did not begin receiving her salary until October 5.[1]

Up until August 30, Ms. Roebuck was out of work and receiving unemployment compensation from the District's Department of Employment Services (DOES). For four weeks after she started working at the Office on Aging, on September 4, 11, 18, and 25, Ms. Roebuck continued to file for and collect unemployment compensation. In each filing, she falsely certified that she had not returned to work and had no earnings in each of those weeks.

In August 2011, after having audited Ms. Roebuck's wages, DOES ordered her to repay the $1,536 she had received in unemployment compensation after August 30, 2010, and barred her from collecting unemployment benefits for three months.[2] Ms. Roebuck appealed this order to the Office of Administrative Hearings (OAH). On September 14, 2011, an Administrative Law Judge (ALJ) upheld the repayment order but reversed the three-month bar on receiving future benefits. The ALJ found that while Ms. Roebuck did make false statements to induce DOES to pay her unemployment compensation for which she was ineligible, DOES did not prove she made those false statements knowingly and willfully, i.e., with a fraudulent intent. The ALJ cited Ms. Roebuck's explanation that the on-line claim

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[1] Ms. Roebuck's start date at the Office on Aging was mistakenly recorded as being September 12. Ms. Roebuck brought this problem to the attention of her superiors on September 9, and the Office undertook to correct it. But as a result of the error, her paycheck for the days she worked from August 30 to September 11, which she should have received on September 21, was delayed until October 13. Meanwhile, she received her paycheck for the second two-week period of her employment on October 5, which appears to have been timely.

[2] DOES found in its audit that Ms. Roebuck had been paid $5,470 in salary for September 2010. It asked Ms. Roebuck why she had not reported these earnings. Her explanation was that she was not paid the $5,470 in September even though that was when she earned it.

forms had thwarted her effort to clarify that she was back at work full time but had not (yet) been paid.[3]

On February 8, 2012, the Office on Aging notified Ms. Roebuck that it proposed to terminate her for cause pursuant to (former) 6-B DCMR § 1603.3(h) (2008),[4] namely, her commission of a criminal offense in violation of D.C. Code § 51-119(a) (2014 Repl.). The Office alleged that Ms. Roebuck committed this offense by "knowingly and willfully fail[ing] to report [her] earnings" in her applications for unemployment compensation in September 2010.[5] A hearing officer was appointed to conduct an administrative review of the proposed removal action.

In her response to the notice of proposed removal, Ms. Roebuck cited the ALJ's previous decision not finding that she had acted fraudulently. She argued that the Office on Aging had deprived her of "remunerative employment" and thereby "rendered [her] 'unemployed'" when it delayed paying her for her first two weeks at work, and that once she started getting paid, she stopped applying for unemployment benefits. Moreover, Ms. Roebuck stated, she did not appeal the OAH decision requiring her to reimburse DOES and "took full responsibility for any overpayment as a result of [her] 'pseudo' employment status." Charging also that the Office on Aging had "knowingly and willingly violated" the District's Anti-

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[3] In an OAH proceeding the following year on Ms. Roebuck's application for unemployment compensation after the Office on Aging terminated her, a second ALJ likewise found that Ms. Roebuck "did not 'knowingly and willfully' fail to report her earnings to DOES" when she applied for benefits in September 2010, and that her "conduct did not constitute dishonesty or otherwise rise to the level of misconduct" disqualifying her from collecting unemployment compensation.

[4] Chapter 16 of Title 6-B was revised in 2016, *see* 63 D.C. Reg. 1265 (Feb. 5, 2016). At all times relevant to this case, § 1603.3(h) provided that an agency could discipline an employee for "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction[.]"

[5] D.C. Code § 51-119(a) makes it a crime to knowingly make a false statement or representation, or knowingly fail to disclose a material fact, to obtain unemployment benefits. The authorized punishment for each such offense is a fine of not more than $100 and/or imprisonment of not more than 60 days. *Id.*

Deficiency Act by deferring her pay in order to record it in the new fiscal year, Ms. Roebuck claimed that she "was a victim of gross financial mismanagement and administrative neglect which resulted in a personal financial crisis that [she] still ha[d] not yet fully recovered from."

The hearing officer acknowledged "how vexing" it was for Ms. Roebuck "to be ensnared in a bureaucratic morass while awaiting wages that were honestly earned." Even so, he concluded, the delay in paying Ms. Roebuck "did not render her unemployed" or "absolve her of her duty to report her earnings to DOES," and her failure to do so was a "conscious" and "intentional" violation of D.C. Code § 51-119(a). The hearing officer concluded that Ms. Roebuck's "conscious failure to report her earnings to DOES in order to continue to unlawfully receive unemployment benefits places her squarely within violation of [6-B DCMR § 1603.3(h)]."

On the question of what penalty to impose for this violation, the hearing officer acknowledged that "[t]he legal standard for the appropriateness of a penalty" required consideration of the twelve so-called *Douglas* factors.[6] In a footnote, the hearing officer listed all of those factors. But apart from his discussion of the offense itself and the permissible penalty, the hearing officer did not discuss their applicability; nor did he find that the Office on Aging had considered the *Douglas* factors in proposing Ms. Roebuck's removal. (The *Douglas* factors were not addressed in the Office's notice of proposed removal.) Instead, the hearing officer simply stated that removal was "within the acceptable range of penalties" and "reasonable," and that he "therefore recommended that [Ms. Roebuck] be removed from her position as proposed." The Office on Aging formally accepted the hearing officer's recommendation and issued a final decision of summary removal on April 11, 2012. This final decision reiterated that the penalty of removal was "within the acceptable range of penalties" and was "a reasonable penalty." The decision did not mention the *Douglas* factors.

Ms. Roebuck appealed her removal to the OEA. She asserted that the Office on Aging did not have cause to fire her pursuant to 6-B DCMR § 1603.3(h) because she did not *knowingly* submit false information in order to receive unemployment compensation. In the alternative, she contended that the Office failed to consider the *Douglas* factors, a number of which she argued were mitigating, in determining the appropriate penalty. In opposition, the Office on Aging argued that it had cause

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[6] *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305-06 (1981).

to fire Ms. Roebuck because there was no dispute that she made false statements to obtain unemployment benefits, and because D.C. Code § 51-119(a) recognizes "no defense of financial hardship" and "does not consider the reasons why an individual submitted false statements." The Office asserted it had "reviewed and applied the relevant *Douglas* factors" in selecting the penalty of removal, but it did not support that assertion with any record of such consideration or say which factors it considered relevant or how it had considered them.[7]

The appeal was assigned to an OEA Administrative Judge (AJ) in October 2013. Based on the parties' briefs, the AJ concluded there were no material issues in dispute and that an evidentiary hearing was unnecessary. The AJ upheld the decision to terminate Ms. Roebuck for violating D.C. Code § 51-119(a). She found, among other things, that when Ms. Roebuck applied for unemployment compensation in September 2010 and denied being employed, she either had "actual knowledge of the falsity" of that statement or "made the statement recklessly, careless of whether it was true or false." The AJ further found that the penalty allowed by the applicable Table of Appropriate Penalties for commission of a first offense of this nature ranged from a ten-day suspension to removal,[8] that the Office on Aging had "sufficient cause" to remove Ms. Roebuck, and that "its chosen penalty of removal is reasonable and is clearly not an error of judgment." The AJ also said the Office had "presented evidence that it considered" the relevant *Douglas* factors, but even though this was disputed, she did not identify any "evidence" that supposedly showed such consideration. Nor did the AJ make any findings concerning how the Office applied the *Douglas* factors in deciding what sanction to impose or whether it had done so properly. There is a void in the record on all these points.

On appeal, the OEA Board upheld the AJ's affirmance of Ms. Roebuck's termination. It found record support for the conclusion that the Office on Aging had cause to terminate her, and it rejected Ms. Roebuck's argument that the OAH decisions precluded a finding that she knowingly or willfully violated D.C. Code

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[7] In support of its assertion that it had reviewed and applied the relevant *Douglas* factors, the Office cited only its notice of proposed removal, the hearing officer's recommendation, and its final decision of summary removal. As noted above, none of those documents discussed how the *Douglas* factors applied to Ms. Roebuck's case.

[8] *See* (former) 6-B DCMR § 1619.1(8) (2008).

§ 51-119(a). The Board also found that the Office on Aging had fulfilled its duty to consider the *Douglas* factors by reviewing the hearing officer's report before reaching its final decision.

The Superior Court denied Ms. Roebuck's petition for review and affirmed the OEA Board. The court found there to be "ample evidence" in the record that Ms. Roebuck knowingly made false statements to obtain unemployment compensation, notwithstanding the contrary OAH decisions. It also rejected her argument that the Office on Aging could not penalize her for violating D.C. Code § 51-119(a) when she had not even been arrested for that offense. In response to Ms. Roebuck's argument that the Office had failed to consider the *Douglas* factors, the court agreed that "the record includes '*Douglas*' evidence" but was satisfied that the Office had "presented evidence that it considered factors outlined in *Douglas*." The court did not say what evidence the Office had presented on that score, nor did it describe or evaluate the Office's supposed consideration of the *Douglas* factors.

II.

Although this case comes to us on appeal from the Superior Court, we review the OEA's decision "as though the appeal ha[d] been taken directly to this court."[9] Thus, as necessitated by the parties' claims,

> we must examine the administrative record to determine whether there has been procedural error, whether there is substantial evidence in the record to support the OEA's findings, or whether the OEA's action was in some manner arbitrary, capricious, or an abuse of discretion.[10]

In a proceeding, such as this one, challenging the removal of an employee for misconduct, the employing agency has the "burden of persuasion" with respect to three elements:

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[9] *District of Columbia Metro. Police Dep't v. District of Columbia Office of Emp. Appeals*, 88 A.3d 724, 727 (D.C. 2014).

[10] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985) (citing D.C. Code § 1-1510 (1981); other citations omitted).

> (1) that the employee actually committed the alleged misconduct; (2) that there is a sufficient nexus between the misconduct and the efficiency of the service to sustain an adverse action; and (3) that the penalty imposed has been appropriately chosen for the specific misconduct involved.[11]

For its part, the OEA's task in this case was "not to substitute its judgment" for that of the Office on Aging, but "simply to ensure that 'managerial discretion has been legitimately invoked and properly exercised.'"[12]

Ms. Roebuck challenges her termination on three principal grounds. First, she argues that absent proof of an arrest record, she could not be disciplined pursuant to 6-B DCMR § 1603.3(h) for having committed a criminal act. Second, she argues that the OEA erred in failing to accord evidentiary significance to the findings by the ALJs in the DOES proceedings that she did not knowingly make a false statement to obtain unemployment benefits.[13] Third, she argues that the OEA erred in finding that the Office on Aging appropriately considered the mitigating *Douglas* factors in deciding to terminate her. For the reasons that follow, we reject the first two contentions but agree with the third.

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[11] *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Parsons v. United States Dep't of Air Force*, 707 F.2d 1406, 1409 (D.C. Cir. 1983)).

[12] *Stokes*, 502 A.2d at 1010 (quoting *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 301 (1981)).

[13] Relatedly, Ms. Roebuck complains that without taking testimony itself, the OEA lacked substantial evidence to find she knew her statements to obtain unemployment benefits were false. We find this complaint to be meritless; Ms. Roebuck admittedly knew she was working full time for pay when she declared the contrary on her applications for benefits. In her reply brief, Ms. Roebuck argues that the OEA's failure to hold an evidentiary hearing was reversible error in itself. The OEA Board rejected this contention on the ground that the OEA Rules provide that an evidentiary hearing is discretionary. We do not address the claim. "It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief." *Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997).

A. Absence of Arrest Record

The regulation pursuant to which Ms. Roebuck was terminated, former 6-B DCMR § 1603.3(h), defines "cause" for disciplinary action to include "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction." This definition does not state that proof of an arrest record is ever required. In support of her claim that it was required in this case, Ms. Roebuck cites the accompanying Table of Appropriate Penalties in (former) 6-B DCMR §1619.1(8) (2008). With reference to discipline for criminal acts, the Table states: "Conviction not needed; [the agency] may act on the arrest if the arrest is related to the job. Proof needed: Arrest record." But while this brief notation indicates that proof of an arrest record may be necessary when an agency relies on an arrest to establish that an employee committed a criminal act, that does not mean proof of arrest is *always* necessary to prove that fact in the absence of a conviction. Another regulation, former 6-B DCMR § 1603.4, indicates otherwise; it states that "[t]he causes specified in section 1603.3 of this section shall include *but not necessarily be limited to* the infractions or offenses under each cause contained in the Table of Appropriate Penalties in section 1619 of this chapter." (Emphasis added.) In other cases besides this one, the OEA Board has understood this to mean an agency is *not* precluded from disciplining employees for violating D.C. Code § 51-119(a) merely because they were not arrested (or charged).[14] To the extent there is any ambiguity to be resolved, "we routinely accord great deference to an agency's interpretation of its own regulations."[15] We see no reason to depart from that practice here.

B. The OAH Decisions

Two ALJs in Ms. Roebuck's unemployment benefits proceedings found she did not "knowingly" submit false information to obtain unemployment

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[14] *See Fulford-Cuthbertson et al. v. Department of Corrections*, consolidated OEA matters 1601-10-13R16, 1601-16-13R16, 1601-17-13R16, and 1601-18-13R16 at 11 (June 6, 2017) ("Agency was not required to produce an arrest record to support a cause of action under DCMR § 1603.3(h).").

[15] *Dupree v. District of Columbia Dep't of Corrections*, 132 A.3d 150, 154-55 (D.C. 2016); *see also, e.g., District of Columbia Dep't of Pub. Works v. Colbert*, 874 A.2d 353, 359 (D.C. 2005) (deferring to Board's "reasonable interpretation" of regulation in 6 DCMR).

compensation. Ms. Roebuck argues that, "[b]y overlooking this compelling evidence, the OEA failed to base its decision on substantial evidence."[16] This argument is misconceived. There is a difference between "evidence" and the factual conclusions that a factfinder draws from evidence. "In the absence of issue preclusion or a statute providing for their admissibility, findings in one proceeding are not evidence in a different proceeding[.]"[17] Thus, it would have been error for the OEA to treat the ALJs' findings in the unemployment benefit cases as admissible "evidence" of the facts found. And though Ms. Roebuck did argue below that the ALJs' factual determinations were preclusive, on appeal she has abandoned this contention, and rightly so. We have held that, by law, the findings of fact in unemployment benefits hearings have "no binding effect on decision makers in subsequent adjudicatory proceedings between an employee and an employer," including OEA proceedings, and that the OEA properly undertakes "an independent analysis of [an employee's] termination."[18]

C. The *Douglas* Factors

"The primary discretion in selecting a penalty has been entrusted to agency management, not to the OEA."[19] In this case, the Office on Aging had a broad spectrum of sanctions from which to choose; as previously mentioned, the allowable penalty in Ms. Roebuck's case ranged from a ten-day suspension to removal.[20] The OEA's review of an agency's choice of penalty "is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness."[21]

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[16] Brief for Appellant at 31.

[17] *In re Zita*, 915 N.E.2d 1067, 1076 (Mass. 2009) (holding it was error for a judge to consider prior findings in a protective case in granting the state's emergency order for custody of a child).

[18] *Jahr v. District of Columbia Office of Emp. Appeals*, 19 A.3d 334, 338, 340 (D.C. 2011); *see also* D.C. Code § 51-111(j) (2014 Repl.).

[19] *Stokes*, 502 A.2d at 1011 (internal quotation marks omitted).

[20] 6-B DCMR 1619.1(8).

[21] *Stokes*, 502 A.2d at 1011 (quoting *Douglas*, 5 M.S.P.R. at 306).

For guidance as to the relevant factors, the OEA and this court have looked to the twelve factors identified by the OEA's federal counterpart, the Merit Systems Protection Board, in *Douglas*.[22] Several of these factors may weigh in favor of lessening the penalty in a particular case, including "mitigating circumstances surrounding the offense," the "potential for the employee's rehabilitation," "the employee's past disciplinary record," and "the employee's past work record."[23] Other *Douglas* factors may point in a different direction or be neutral or inapplicable in a given case. Thus, "[s]election of an appropriate penalty must . . . involve a responsible balancing of the relevant factors in the individual case."[24] If the agency fails to show that it "conscientiously" weighed the relevant factors, the OEA's duty is to "specify how the agency's decision should be corrected" and remand the matter to the agency for the necessary consideration.[25]

We agree with Ms. Roebuck that the OEA erred in finding that the Office on Aging considered the relevant, mitigating *Douglas* factors in deciding to terminate her. That finding is not supported by substantial evidence in the record; as discussed above, nothing in the record shows that the Office "conscientiously" considered the mitigating factors in Ms. Roebuck's case. In its initial notice of proposed removal, the Office did not mention the *Douglas* factors. The hearing officer acknowledged that those factors must be considered when assessing the appropriateness of a penalty, but he neither considered them himself nor found that the Office had done so. In its final decision imposing removal, the Office on Aging still did not even mention the *Douglas* factors.

In the ensuing proceedings before the OEA and in Superior Court, the Office and the OEA provided no support for their conclusory assertions that the relevant *Douglas* factors had been considered. Understandably enough, on the vacant record presented to them, the OEA and the Superior Court did not themselves consider the

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[22] *See id.* at 1010-11; *Douglas*, 5 M.S.P.R. at 305-06; *see also, e.g.*, *Colbert*, 874 A.2d at 356 & n.4.

[23] *Douglas*, 5 M.S.P.R. at 305-06.

[24] *Stokes*, 502 A.2d at 1011 (quoting *Douglas*, 5 M.S.P.R. at 306).

[25] *Id.* (quoting *Douglas*, 5 M.S.P.R. at 306); *see also Colbert*, 874 A.2d at 361.

Douglas factors or purport to evaluate the consideration given them by the Office on Aging. The fact that the record did not permit them to do so is dispositive.

In this Court, the Office nonetheless continues to assert conclusorily that "[t]he record shows . . . that the Office addressed the relevant factors in exercising its discretion in the selection of termination as the appropriate penalty."[26] But the record still does *not* show that, and the Office still cites nothing supporting its claim.

In the alternative, the Office argues – for the first time in this court – that Ms. Roebuck waived her right to its consideration of mitigating *Douglas* factors by failing to raise them with the hearing officer in her response to the initial proposal that she be terminated.[27] This argument is not persuasive. For one thing, it is less than accurate, as Ms. Roebuck did raise the factual predicate for at least some of the *Douglas* factors in her response to the notice of proposed removal.[28] Furthermore, Ms. Roebuck contended throughout the proceedings before the OEA and the Superior Court that the Office had failed to consider the mitigating *Douglas* factors, and the Office did not object to her doing so or claim that her failure to raise those factors with the hearing officer had impeded such consideration. Instead, the Office always responded that it *did* fully consider the *Douglas* factors. The hearing officer himself – an Assistant Attorney General in the Office of the General Counsel in the Department of Human Services – likewise never said any default on Ms. Roebuck's part impeded consideration of the *Douglas* factors. And even now, the Office on Aging does not demonstrate that it was inhibited from addressing such potentially mitigating factors as Ms. Roebuck's work record, lack of prior discipline, potential for rehabilitation, and financial distress due to the Office's failure to pay her on time.

We conclude that the Office on Aging did not shoulder its burden of persuasion regarding the penalty it selected by showing that it "conscientiously"

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[26] Brief for Appellee at 25.

[27] *Id.* at 27-28.

[28] Specifically, she argued that she was effectively "unemployed" during the time that she filed her unemployment compensation forms because she was not receiving a paycheck, and as a result was suffering a "personal financial crisis that [she] ha[d] still not yet fully recovered from." These facts implicated the *Douglas* factors that require the agency to consider any "mitigating circumstances surrounding the offense" and the "potential for the employee's rehabilitation."

considered all the relevant *Douglas* factors to "strike a responsible balance within tolerable limits of reasonableness" as to the appropriate discipline to impose on Ms. Roebuck.[29] We therefore must reverse the Superior Court's affirmance and remand with directions to vacate the decision of the OEA and return the case to it for further proceedings consistent with this opinion.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Jennifer Di Toro

Director, Civil Division

Copies e-served to:

Robert B. Fitzpatrick, Esquire

Lucy E. Pittman, Esquire
Assistant Attorney General

Loren L. AliKhan, Esquire
Solicitor General for DC

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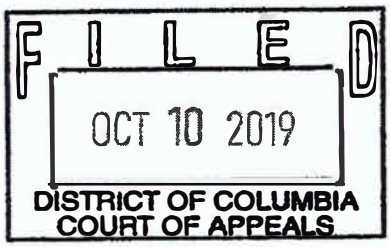
[29] We express no view whatsoever as to exactly how the balance should be struck, and we expressly do not hold that removal from government service is necessarily precluded. Although Ms. Roebuck argues that her termination was "beyond the bounds of reasonableness" and an abuse of discretion given the nature of her "so-called crime" and what she calls "the overwhelming evidence of mitigating circumstances and the lack of any intent to defraud the City government," Reply Brief for Appellant at 7-8, these are factual issues and discretionary judgments for agency determination on a yet-to-be made record and not for this court to resolve in this appeal.

District of Columbia Court of Appeals



No. 17-CV-872

YORDANOS SIUM,

Appellant,

v. **CAP4119-16**

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division

BEFORE: Glickman and Easterly, Associate Judges, and Steadman, Senior Judge.

J U D G M E N T

This case came to be heard on the transcript of record and the briefs filed, and it was argued by counsel. On consideration whereof, and as set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the Office of Employee Appeals ("OEA") Boards' decision is vacated and this matter is remanded to the OEA for further

proceedings consistent with this opinion.

For the Court:

JULIO A. CASTILLO
Clerk of the Court

Dated: October 10, 2019.

Opinion by Associate Judge Catherine Easterly

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-872

YORDANOS SIUM, APPELLANT,

v.

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CAP-4119-16)

(Hon. Jeanette J. Clark, Associate Judge)
(Hon. Robert R. Rigsby, Associate Judge)[1]

(Argued November 16, 2018 Decided October 10, 2019)

David A. Branch for appellant.

Lucy E. Pittman, Assistant Attorney General, with whom *Karl A. Racine*, Attorney General for the District of Columbia, *Loren L. Alikhan*, Solicitor General,

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[1] This court has jurisdiction to review agency orders and decisions that are final. *District of Columbia Dep't of Emp't Servs. v. Vilche*, 934 A.2d 356, 358–59 (D.C. 2007). Although pursuant to D.C. Code § 1-606.03(d) (2016 Repl.) orders and decisions from the Office of Employee Appeals ("OEA") are first reviewable by the Superior Court before they are reviewed by this court, the exclusive focus of our analysis in this opinion is the OEA Board's order denying Ms. Sium's petition for review.

and *Stacy L. Anderson*, Acting Deputy Solicitor General, were on the brief, for appellee.

Before GLICKMAN and EASTERLY, *Associate Judges*, and STEADMAN, *Senior Judge*.

EASTERLY, *Associate Judge*: Appellant Yordanos Sium challenges her termination for cause by the Office of the State Superintendent of Education ("OSSE"). We first conclude that Ms. Sium's failure to file an appeal to the Office of Employee Appeals ("OEA") within thirty days, as specified in D.C. Code § 1-606.03(a) (2016 Repl.), did not deprive OEA of jurisdiction to hear her case. We further conclude that, because the OEA Administrative Law Judge ("ALJ") decided not to conduct an evidentiary hearing even though the parties' briefing disputed material facts, the OEA Board abused its discretion in denying Ms. Sium's petition for review. We therefore vacate and remand.

I.

Ms. Sium worked as a school bus driver for OSSE. In January 2011, her bus made contact with an illegally parked vehicle. She did not exit her bus and instead left the scene. The incident, which was recorded on videotape, was reported to OSSE, and an investigator interviewed Ms. Sium the following day. According to the investigator's report, Ms. Sium initially told the investigator that she had not made contact with the illegally parked vehicle, but after the investigator informed

her that she had been seen making contact, she "changed her story" and apologized. OSSE cleared Ms. Sium to return to work about a week after the collision. Almost three months after the incident, OSSE sent Ms. Sium a notice of proposed termination.[2] It then informed Ms. Sium that she was terminated for cause in mid-April 2011.[3] By statute, Ms. Sium had thirty days to appeal her termination to OEA, *see* D.C. Code § 1-606.03(a), although OSSE did not specify this in its termination letter. Ms. Sium filed her pro se appeal in August 2013, using what appears to be an OEA form. No question on the form asked if Ms. Sium wanted an evidentiary hearing.

OSSE moved to dismiss Ms. Sium's OEA appeal, asserting her failure to file within the requisite thirty-day timeframe deprived OEA of jurisdiction. The OEA ALJ did not explicitly rule on this motion and instead ordered briefing on the merits. In its brief, OSSE explained that the Division of Transportation had justifiably terminated Ms. Sium after "conclud[ing] that Ms. Sium's behavior, including hitting a parked car, fleeing the scene, and lying to the investigator,

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[2] The notice stated that the proposed termination was for "Neglect of Duty—failure to follow instructions or observe precautions regarding safety; failure to carry out assigned tasks; careless or negligent work habits." It provided no additional detail.

[3] The April notice repeated the language in the March notice regarding the reason for Ms. Sium's termination.

presented a threat to the efficiency and discipline of the school system." The agency also asserted that this was Ms. Sium's second "preventable" collision within twelve months, although it provided no detail about the earlier incident and engaged in no analysis of why either collision was, in its view, "preventable." In her pro se brief in response, Ms. Sium argued *inter alia* that OSSE had "cleared" her after the January 2011 collision and permitted her to return to work. She further asserted that "[c]ritical facts" alleged by OSSE had not been "determined conclusively" in its investigation; in particular, she challenged the assertions that she had been aware of the collision at the time, that she had fled the scene, and that she had lied to the investigator. Instead, she asserted that she had accepted responsibility only after she was informed by the investigator that she had made contact with the other vehicle.

The OEA ALJ issued a written decision in October 2014 upholding Ms. Sium's termination. In one sentence of her decision, the OEA ALJ acknowledged her ability to hold an evidentiary hearing, but stated that, "[a]fter considering the parties' arguments," she had determined that an evidentiary hearing was unnecessary.

Ms. Sium then filed pro se a petition for review with the OEA Board. Among other arguments, Ms. Sium asserted that there were disputed issues of fact and argued that the OEA ALJ had thus erred in her decision "not to conduct an [e]videntiary [h]earing."[4] In its May 2016 order denying her petition for review, the OEA Board rejected this argument. The OEA Board "relie[d] on OEA Rule 624.2 which provides that 'if the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary, the Administrative Judge will so advise the parties . . . ,'" and concluded that "[t]hus, it is the Administrative Judge's prerogative to hold an evidentiary hearing when it is deemed necessary." Ms. Sium unsuccessfully sought review of the OEA Board's decision in Superior Court. This appeal followed.

II.

"This court reviews agency decisions on appeal from the Superior Court the same way we review administrative appeals that come to us directly. Thus, in the final analysis, confining ourselves strictly to the administrative record, we review the OEA [Board]'s decision, not the decision of the Superior Court . . . ." *Stevens*

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[4] Nothing in the record indicates that OSSE filed an opposition to Ms. Sium's petition for review by the OEA.

v. District of Columbia Dep't of Health, 150 A.3d 307, 311–12 (D.C. 2016) (citation and internal quotation marks omitted). Before we may consider the OEA Board's decision in this case, however, we must address OSSE's challenge to OEA's jurisdiction.

OSSE asks us to conclude that the thirty-day deadline to file an appeal with the OEA, contained in D.C. Code § 1-606.03(a), is jurisdictional. If OSSE is correct, OEA never should have heard this case, and we should remand to OEA to dismiss this appeal. *See Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 (2017) ("[A party's f]ailure to comply with a jurisdictional time prescription . . . deprives a court of [its power to hear a] case, necessitating dismissal—a drastic result" (internal quotation marks omitted)). But as we explained in *Mathis v. District of Columbia Hous. Auth.*, 124 A.3d 1089, 1102 (D.C. 2015), not all filing deadlines are jurisdictional. Indeed, following Supreme Court precedent, we presume they are not and treat these deadlines as waivable claim-processing rules. *Id.* at 1101, 1102 (explaining our "bright line default is that procedural rules, even those codified in statutes, are nonjurisdictional in character" (internal quotation marks and citation omitted)).

The presumption that a filing deadline is a claim-processing rule may be rebutted if certain criteria are fulfilled. *See Mathis*, 124 A.3d at 1102. If a deadline is contained in a statute—not a court rule or a regulation—and its language is mandatory, it may be jurisdictional. *Id.* at 1101–02. Section 1-606.03(a), stating that "[a]ny appeal *shall* be filed within 30 days of the effective date of the appealed agency action," meets both these requirements. D.C. Code § 1-606.03(a) (emphasis added). As our cases and Supreme Court precedent make clear, however, more is required.[5] For a filing deadline to be deemed a jurisdictional bar, the "traditional tools of statutory construction" must also make clear that the legislature intended it to serve this purpose. *Mathis*, 124 A.3d at 1102 (internal quotation marks omitted); *see, e.g.*, *Hamer*, 138 S. Ct. at 20 n.9; *Kwai Fun Wong*, 135 S. Ct. at 1632–33. Here, we see no indication[6] that the D.C.

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[5] The Supreme Court has considered comparable statutory language and repeatedly concluded that it announces a claim-processing rule. *See, e.g.*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630–33 (2015) (holding that the filing deadlines in 28 U.S.C. § 2401(b), which provides that "a tort claim against the United States shall be forever barred unless it is presented to the agency [within the specified time period]," *id.* at 1632, are not jurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438–41 (2011) (holding that the filing deadline in 38 U.S.C. § 7266(a), which states "a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days," *id.* at 438, is not jurisdictional).

[6] OSSE agrees that a legislature "must do something special" to render a deadline a jurisdictional bar, *Mathis*, 124 A.3d at 1102 (quoting *Kwai Fun Wong*, 135 S. Ct. at 1632), and argues that the D.C. Council's decision to locate the thirty-

(continued…)

Council affirmatively sought to curtail OEA's jurisdiction through D.C. Code § 1-606.03(a). Thus, we conclude that § 1-606.03(a)'s thirty-day deadline is not jurisdictional.

Although our holding means that OEA was not required to dismiss Ms. Sium's late-filed appeal outright, OEA was authorized to do so if OSSE "seasonably" objected to the untimeliness of Ms. Sium's filing as a defense. *Brewer v. District of Columbia Office of Emp. Appeals*, 163 A.3d 799, 802 & n.5 (D.C. 2017) (internal quotation marks omitted). OSSE did this. But it subsequently abandoned its objection;[7] and, having done so, it may not resurrect

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(...continued)
day deadline in § 1-606.03, a provision which OSSE claims contains other jurisdictional limitations, provides that indication. We are hesitant to adopt this characterization of these other provisions in § 1-606.03, which discuss the types of adverse actions that an employee can appeal, and we note that a separate subchapter, § 1-606.02, sets out the "authority" of the OEA. *See* D.C. Code § 1-606.02 (2016 Repl.) (providing that the OEA has the "authority" to adjudicate appeals, issue subpoenas, rules, and regulations, and require compliance with its orders, among others). In any event, we are unpersuaded by this proximity argument. "In characterizing certain requirements as nonjurisdictional, [the Supreme Court] ha[s] on occasion observed their separation from jurisdictional provisions. The converse, however, is not necessarily true: Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez v. Thaler*, 565 U.S. 134, 146–47 (2012) (citations and internal quotation marks omitted).

[7] This conclusion can be reached by one of two routes. If, as OSSE seems to suggest, the OEA ALJ never ruled on OSSE's motion to dismiss, then OSSE's
(continued...)

this defense in this court. *See, e.g.*, *George Wash. Univ. v. Violand*, 940 A.2d 965, 977–78 (D.C. 2008). Thus, we need not decide if Ms. Sium's appeal could or should have been dismissed on OSSE's motion or whether the filing deadline should have been equitably tolled. Instead, we turn to the merits of Ms. Sium's appeal.

III.

Ms. Sium argues that the OEA Board's decision was not supported by substantial evidence. Within this argument she makes a more fundamental claim: that the OEA ALJ was unable to base her factual findings on substantial evidence because she did not hold an evidentiary hearing to resolve disputed questions of material fact.

(…continued)
"neglect [in] seek[ing] a ruling on [its] motion" resulted in its "fail[ure] to preserve the issue for appeal." *Carter v. District of Columbia*, 980 A.2d 1217, 1226 (D.C. 2009) (internal quotation marks omitted). As we explained in *Carter*, this court "will excuse such a failure only in exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record." *Id.* (internal quotation marks omitted). As in *Carter*, "[t]hose requirements are not met in this case." *Id.* Alternatively, if the OEA ALJ denied OSSE's motion when she acknowledged it in her order, nonetheless determined she had jurisdiction, and then ruled on the merits, OSSE abandoned this claim by failing to raise the issue—or even file a brief, *see supra* note 3—before the OEA Board.

We review an OEA decision to ensure it is not arbitrary, capricious, or an abuse of discretion. *District of Columbia Dep't of Pub. Works v. Colbert*, 874 A.2d 353, 358 (D.C. 2005). For an OEA decision to pass muster, the agency "must state findings of fact on each material contested factual issue; those findings must be supported by substantial evidence in the agency record; and [its] conclusions of law must follow rationally from its findings." *Rodriguez v. District of Columbia Office of Emp. Appeals*, 145 A.3d 1005, 1009 (D.C. 2016) (quotation marks omitted). "While it is the OEA [Board's] final decision and not that of the [OEA] ALJ that may be reviewed by this court," the OEA Board, and this court in turn, must accept the OEA ALJ's findings of fact "unless they are not supported by substantial evidence." *Colbert*, 874 A.2d at 358.

Ms. Sium, proceeding pro se, sought review from the OEA ALJ using a form that nowhere prompted her to indicate if she requested a hearing. Nevertheless, in her pro se filing, she disputed OSSE's account of the school bus collision and of her response to questioning by the OSSE investigator. Among other things, Ms. Sium challenged OSSE's assertion that security camera footage established that she was aware that her bus had hit the parked car and, by extension, knowingly left the scene, chose not to report the collision, and lied to the OSSE investigator. Moreover, after receiving the OEA ALJ's decision, Ms.

Sium explicitly argued in her pro se petition to the OEA Board that the OEA ALJ should have held an evidentiary hearing because her disputes of fact were material to her appeal.[8]

The OEA Board rejected this argument on the ground that "it is the Administrative Judge's prerogative to hold an evidentiary hearing when it is deemed necessary," citing OEA Rule 624.2, 6-B DCMR § 624.2 (2012) ("If the Administrative Judge grants a request for an evidentiary hearing, or makes his or her own determination that one is necessary, the Administrative Judge will so advise the parties . . . .").[9] To the extent the OEA Board determined that the OEA ALJ has unfettered discretion to deny a petitioner a hearing, we cannot agree. To make findings regarding disputed facts in the absence of a hearing is the essence of arbitrary and capricious decision-making. *Compare Dupree v. District of*

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[8] Although Ms. Sium was less explicit in raising this issue in her pro se petition for review filed in Superior Court, asserting only that the OEA's decision was not supported by substantial evidence, the OEA in its brief to this court has not argued that she abandoned this claim. It asserts instead that her argument that she was entitled to an evidentiary hearing before the OEA ALJ relates only to collateral matters, *see infra*.

[9] The OEA Board also cited to two prior decisions, but neither clearly support this broad proposition, and one of those decisions actually undermines the proposition by acknowledging that an ALJ should hold a hearing when material facts are in dispute. *See DuBuclet v. District of Columbia Pub. Sch.*, OEA Matter No. 2401-0245-10, at 6 (Dec. 17, 2013) (citing *Dupree v. District of Columbia Office of Emp. Appeals,* 36 A.3d 826 (D.C. 2011)).

Columbia Office of Emp. Appeals, 36 A.3d 826 (D.C. 2011) (remanding for an evidentiary hearing where OEA ALJ should have been aware there were material issues of disputed facts that needed to be resolved), *with Anjuwan v. District of Columbia Dep't of Pub. Works*, 729 A.2d 883, 885–86 (D.C. 1998) (affirming OEA ALJ's denial of an evidentiary hearing where, even after the ALJ ordered the parties to identify the issues, appellant made no mention of the issue he wished to be resolved at a hearing). Alternatively, to the extent the OEA Board implicitly determined that there were no material issues of disputed facts necessitating a hearing, the record does not support that determination.

OSSE now seeks to minimize as "collateral" the OEA ALJ's findings that Ms. Sium had both knowingly fled the scene of the collision and lied to an investigator. But these were the grounds for termination OSSE itself set forth in its brief to the OEA. And these were the grounds the OEA ALJ relied upon to support its determination that Ms. Sium had "neglected her duties" and could be terminated by OSSE. *See Jones v. District of Columbia Dep't of Emp't Servs.*, 519 A.2d 704, 709 (D.C. 1987) (observing that we limit our review of an agency's decision to the grounds the agency relied on at the time it made its decision). By contrast, the OEA ALJ made little mention of the ground that OSSE now asserts supported its termination decision—the fact that Ms. Sium had had two "preventable accidents."

The OEA ALJ noted Ms. Sium's prior alleged collision only to explain that Ms. Sium, having previously been "in another accident," could be deemed to have been aware of the "Accident Policy as listed in the [Division of Transportation] policy and procedure manual" that required her to report the incident. The OEA ALJ did not independently analyze whether this incident or the earlier one was "preventable."[10]

For these reasons, we conclude the OEA Board abused its discretion in denying Ms. Sium's petition for review where the OEA ALJ decided this case without an evidentiary hearing.[11] We therefore vacate the OEA Board's decision

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[10] Whether an accident is "preventable" is determined by a special entity, the Accident Review Board. OSSE Div. of Transp. Policy & Proc. Manual § 207.1(E) (2010). The record before us does not include information about the Accident Review Board's assessment, if any, of either of Ms. Sium's two collisions.

[11] Ms. Sium's argument that she was denied due process when OSSE did not affirmatively arrange for a pre-termination hearing is without merit. The notice of proposed termination letter advised Ms. Sium that she had a right to request a pre-termination hearing, and Ms. Sium does not contend that she ever tried to avail herself of this process. *See Chase v. Pub. Def. Serv.*, 956 A.2d 67, 75 (D.C. 2008) ("Because [appellant] declined to take advantage of [an] opportunity [to appeal his termination to the Board of Trustees], he cannot demonstrate that he was deprived of due process.").

and remand this matter to the OEA for further proceedings consistent with this opinion.[12]

So ordered.

[12] Because we conclude that vacatur and remand is in order we do not address Ms. Sium's claim that the OEA failed to consider lesser penalties.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DEVLIN HILLMAN	:	Case Number: 2018 CA 8613 P (MPA)
v.	:	Judge: Florence Y. Pan
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS	:	

ORDER

This matter comes before the Court upon consideration of Petitioner Devlin Hillman's Petition for Review of Agency Decision ("Pet."), filed on December 14, 2018; Petitioner's Brief in Support of the Petition for Review of Agency Decision ("Pet. Br."), submitted on May 17, 2019; respondent District of Columbia Office of Employee Appeals' Statement in Lieu of Brief ("Resp. Br."), filed on June 14, 2019; and intervenor District of Columbia Department of Parks and Recreation's Brief ("DPR Br."), filed on September 3, 2019. The Court has considered the papers, the relevant law, and the administrative record. For the following reasons, the Petition for Review is denied.

FACTUAL BACKGROUND

Petitioner requests review of the Office of Employee Appeals's ("OEA") dismissal of his appeal challenging the Department of Parks and Recreation's ("DPR") decision to terminate him. *See generally* Pet. Petitioner worked for DPR as a Recreation Specialist (Lifeguard) since January of 2013. *See* Administrative Record ("A.R.") at 1. He was also Chief Shop Steward for the American Federation of Government Employees Local 2741 (the "Union"). *See id.* at 43. In late 2014, DPR instituted a requirement that Lifeguards, such as Petitioner, complete the International Lifeguard Training Program ("ILTP"). *See id.* at 154. Affected employees were made aware that not complying with the new certification requirement would subject them to

disciplinary action. *See id.* at 155. DPR paid for the training of all relevant employees and provided opportunities for them to complete the training during regular work hours, offering approximately two trainings per month since the end of 2015. *See id.* at 138-143. The few employees who had not completed the training on May 6, 2015, were invited to complete the training and certification by May 18, 2015. *See id.* at 154-55. By May of 2016, a year after the deadline to complete the training, Petitioner had twice failed to comply with Agency direction to complete training on specified dates. *See id.* at 80-81. Petitioner was suspended twice for this insubordination, but was provided a final opportunity to undergo training in June and July of 2016. *See id.* at 58, 70, 101. On July 18, 2016, Petitioner still had not completed the ILTP certification and was served with an Advance Notice of Proposed Removal. *See id.* at 61-64. Petitioner was charged with three instances of insubordination, related to his repeated failure to comply with directions to undergo the training. *See id.* at 47, 70, 101. Petitioner was served a Final Decision on Proposed Removal and terminated on August 24, 2016. *See id.* at 47.

PROCEDURAL HISTORY

On September 22, 2016, Petitioner filed an appeal with OEA contesting DPR's decision to terminate him. *See id.* at 1-11. Petitioner contended that the removal action was improper because (1) the disciplinary decision did not rely on the factors enumerated in the Merit Protection Board's decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981); (2) the change in the licensing requirement was not bargained for pursuant to the Collective Bargaining Agreement ("CBA"); (3) three other employees who were required to complete the certification but had failed to do so had no adverse action taken against them; and (4) the Agency did not acknowledge Petitioner's religious objection to a training date. *See id.* at 2.

Administrative Judge Eric Robinson (the "AJ") dismissed Petitioner's appeal on November 16, 2018. *See generally* Resp. Br., Ex. 1 ("Initial Decision"). The AJ found "that DPR ha[d] the authority to change the licensing requirements for Recreation Specialists," and that DPR had appropriately charged Petitioner with insubordination. *See id.* at 4. Relying on OEA precedent, the AJ concluded that Petitioner's failure to become ILTP-certified made him an at-will employee at the time of his removal, and that Petitioner therefore had no right to an OEA appeal. *See id.* at 4-5. Accordingly, the AJ dismissed Petitioner's appeal for lack of jurisdiction. *See id.*

Petitioner filed the instant Petition for Review of Agency Decision on December 14, 2018,[1] and submitted a brief in support of the Petition on May 17, 2019. Petitioner raises eight arguments on the merits,[2] but does not address OEA's lack of jurisdiction over at-will employees in his brief. *See generally* Pet. OEA filed a Statement in Lieu of Brief on June 14, 2019, consisting of the Initial Decision written by AJ Robinson. *See generally* Resp. Br. Ex. 1. On September 3, 2019, DPR, as an intervenor, filed a brief in opposition of the Petition for Review, arguing that (1) OEA's determination that it lacked jurisdiction is supported by substantial evidence and (2) the ruling is not clearly erroneous as a matter of law. *See* DPR Br. at 5.

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[1] Petitioner filed his appeal of the Administrative Judge's decision in this Court without first appealing to the OEA Board. *See* D.C. Code § 1-606.03(d) (allowing appeals of OEA decisions to be made in this Court); *see also* Employee Appeals Process, OEA Website, https://oea.dc.gov/page/employee-appeals-process-details (stating that an appeal of an Initial Decision may be made to either the full OEA Board or this Court).

[2] Specifically, Petitioner argues that (1) DPR failed to notify the Union of the adverse action in a timely manner; (2) the Court should reject DPR's argument that service upon him constitutes service upon the Union; (3) DPR did not have the authority to require ILTP certification as a condition of employment ; (4) DPR failed to begin corrective or adverse action within time limits proscribed by D.C. Personnel Regulation § 1602.3; (5) disciplining Petitioner in 2016 for a charge dismissed in 2015 was a pretext to terminate him for whistle-blowing and union activities; (6) other similarly situated DPR employees who failed to obtain ILTP certification were not terminated; (7) the Union and DPR have not bargained regarding ITLP certification; and (8) DPR scheduled petitioner to complete the certification on his Sabbath and over religious objections. *See* Pet. at 10-24.

STANDARD OF REVIEW

When reviewing a decision from an administrative agency, there is a "presumption of correctness of the agency's decision" and the burden is placed on the petitioner to demonstrate agency error. *See Cooper v. District of Columbia Dep't of Emp't Servs.*, 588 A.2d 1172, 1174 (D.C. 1991). The Court may not set aside an agency decision if it is "supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." *See* D.C. Super. Ct. Civ. R. Agency Review 1(g). If substantial evidence supports the agency's findings, the Court must affirm the agency decision even though contrary evidence may also exist in the record. *See Ferreira v. District of Columbia Dep't of Emp't Servs.*, 667 A.2d 310, 312 (D.C. 1995). "The corollary of this proposition, however, is that we are not obliged to stand aside and affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law." *See Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161, 1166 (D.C. 1991). Reversal is proper only where OEA's actions were "arbitrary, capricious, or an abuse of discretion." *See Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1157 (D.C. 2005).

ANALYSIS

Petitioner's appeal to OEA was dismissed for lack of jurisdiction. *See* Initial Decision at 6. In OEA adjudications, the employee carries the burden of establishing jurisdiction by a preponderance of the evidence. *See* OEA Rule 628.1-628.2, 59 D.C. Reg. 2129 (2012). A preponderance of the evidence requires a "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." *See id.* The AJ found that OEA lacked jurisdiction over Petitioner's

appeal because, as a result of failing to obtain the ILTP certification required by DPR, he became an at-will employee. *See generally* Initial Decision.

Here, Petitioner does not dispute that he failed to complete the ILTP, which was a required certification for lifeguards employed by DPR. *See generally* Initial Decision. Employees who do not fulfill required certification or licensing requirements lose career status and become at-will employees. *See, e.g., Donald Frazier v. D.C. Public Schools,* Initial Decision on Remand, OEA Matter No. 1601-0161-12R17 at 7 (Dec. 21, 2017) (holding employee who failed to maintain the proper license was deemed at-will at time of removal); *Bowling-Bryant v. D.C. Public Schools*, OAE Matter No. 1601-0090-16 at 6 (May 30, 2017) (same); *Wubishet v. District of Columbia Public Schools,* Opinion and Order on Petition for Review, OEA Matter No. 1601-0106-06 at 4 (June 23, 2007) (same).

OEA does not have jurisdiction over at-will employees because they may be discharged "at any time and for any reason, or for no reason at all." *See Adams v. George W. Cochran & Co.,* 597 A.2d 28, 30 (D.C. 1991); *Wubishet*, OEA Matter No. 1601-0106-06, at 4. Further, OEA has "no authority to review issues beyond its jurisdiction." *See Wubishet*, OEA Matter No. 1601-0106-06, at 4. As such, OEA cannot reach the merits of an appeal brought by a terminated at-will employee. *See West v. D.C. Department of Employment Services*, Initial Decision, OEA Matter No. J-0050-19 at 4 (Aug. 7, 2019). This Court has affirmed other OEA decisions that dismissed appeals brought by at-will employees. *See, e.g., Ellis et. al. v. D.C. Department of Consumer and Regulatory Affairs,* No. 2011 CA 001529 P(MPA) at 6 (D.C. Super. Ct. Nov. 28, 2011) (affirming OEA Board decision that it lacks jurisdiction over appeals from terminated at-will employees). Accordingly, OEA's dismissal of Petitioner's appeal was supported by undisputed evidence, and was not clearly erroneous.

Based on the foregoing analysis, this 18th day of October, 2019, it is hereby

ORDERED that the Petition for Review of Agency Decision is **DENIED**; and it is further

ORDERED that all future events scheduled in this matter are **VACATED**, and the case is **CLOSED**.

SO ORDERED.

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

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District of Columbia Court of Appeals

No. 18-CV-1238

WIDMON BUTLER,

Appellant,

v.

CAP-7843-17

METROPOLITAN POLICE DEPARTMENT, *et al.*,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division

BEFORE: Blackburne-Rigsby, Chief Judge, and Glickman and McLeese, Associate Judges.

JUDGMENT

This case came to be heard on the transcript of record and the briefs filed, and it was argued by counsel. On consideration whereof, and as set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the judgment of the Superior Court is vacated and the case is remanded for the Superior Court to remand the case to OEA for further proceedings.

For the Court:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Dated: October 29, 2020.

Opinion by Associate Judge McLeese.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CV-1238

WIDMON BUTLER, APPELLANT,

v.

METROPOLITAN POLICE DEPARTMENT, et al., APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CAP-7843-17)

(Hon. Anthony C. Epstein, Trial Judge)

(Argued January 29, 2020 Decided October 29, 2020)

David A. Branch for appellant.

Carl J. Schifferle, Senior Assistant Attorney General, with whom *Karl A. Racine*, Attorney General for the District of Columbia, *Loren L. AliKhan*, Solicitor General, and *Caroline S. Van Zile*, Deputy Solicitor General, were on the brief, for appellee Metropolitan Police Department.

Lasheka Brown Bassey filed a statement in lieu of brief for appellee Office of Employee Appeals.

Before BLACKBURNE-RIGSBY, *Chief Judge*, and GLICKMAN and MCLEESE, *Associate Judges*.

MCLEESE, *Associate Judge*: Appellant Widmon Butler challenges a decision of the Office of Employee Appeals (OEA) upholding his termination by the

Metropolitan Police Department (MPD). Mr. Butler argues primarily that MPD waited too long before terminating him. We remand for further proceedings with respect to that issue.

I.

Except as indicated, the following facts are undisputed. Mr. Butler, who is an attorney, worked as a claims specialist in MPD's Medical Services Division. His duties included helping to determine whether MPD employees' injuries and illnesses arose in the performance of duty. In July 2013, Mr. Butler's union asked him to represent another union member and MPD civilian employee, Ms. Josephine Jackson, in a proceeding before the District of Columbia Office of Risk Management (ORM). He agreed. As part of this representation, Mr. Butler emailed ORM in August 2013 to request that ORM reconsider three workers' compensation claims that Ms. Jackson had filed. Mr. Butler sent the email from his MPD account, identifying himself as an attorney.

On September 12, 2013, ORM's General Counsel contacted MPD's Human Resources Management Division with concerns about Mr. Butler's email. Specifically, ORM's General Counsel noted that Mr. Butler had apparently sent the

email from his MPD account during work hours, even though he represented Ms. Jackson privately. ORM's General Counsel also stated that Mr. Butler's position as a claims examiner working in connection with MPD's clinic raised conflict-of-interest issues, because Ms. Jackson had been treated at that clinic.

The same day, MPD's Human Resources Director contacted MPD's Internal Affairs Division (IAD) to request that IAD look into Mr. Butler's conduct. IAD assigned Sergeant Paulette Woodson to do so. On September 18, 2013, Sergeant Woodson emailed the United States Attorney's Office (USAO) to notify the USAO that she was investigating whether Mr. Butler had "double-dipped," i.e., handled private matters during his MPD work hours. Later the same day, the Medical Services Division created a report indicating that Mr. Butler had accessed Ms. Jackson's medical records in July 2013, while on duty. The next day, September 19, 2013, MPD placed Mr. Butler on administrative leave without pay pending the investigation into his conduct, including into whether Mr. Butler had accessed Ms. Jackson's medical records without authorization.

On October 1, 2013, MPD referred the matter to the USAO, asking the USAO to determine whether criminal charges should be brought against Mr. Butler for illegally accessing MPD's medical database by viewing Ms. Jackson's files for his

own personal purposes. Eight months later, on June 2, 2014, the USAO issued a letter declining to criminally prosecute Mr. Butler.

MPD then conducted its own disciplinary investigation. IAD interviewed Mr. Butler in September 2014. Mr. Butler denied accessing or seeing Ms. Jackson's medical records, even after being shown a report indicating the date and time on which he had opened her file. On October 6, 2014, MPD served Mr. Butler with a notice of proposed termination, charging him with misfeasance for (1) accessing Ms. Jackson's medical records in violation of MPD's acceptable-use agreement; (2) misusing government property; and (3) making untruthful statements during an IAD interview.

MPD Commander Keith Williams subsequently recommended that Mr. Butler be terminated, rejecting Mr. Butler's claim that the notice of proposed termination was untimely under the "ninety-day rule." *See* D.C. Code § 5-1031(a-1)(1) (2019 Repl.) (requiring MPD to commence adverse action against employees no more than ninety business days after MPD had notice of act or occurrence allegedly constituting cause); D.C. Code § 5-1031(b) (ninety-day period is tolled while act or occurrence allegedly constituting cause is subject of criminal investigation by, among other agencies, MPD and USAO). Specifically, Commander Williams

concluded that MPD considered Mr. Butler's conduct criminal as soon as MPD found out about the conduct, and the ninety-day limit therefore did not start running until June 2, 2014, when the USAO declined to prosecute.

MPD subsequently terminated Mr. Butler, who appealed his termination to MPD Chief Lanier, arguing primarily that the ninety-day rule barred the termination. Chief Lanier disagreed, reiterating that MPD had considered Mr. Butler's actions criminal since their discovery on September 12, 2013. Chief Lanier further explained that Mr. Butler's termination was also based on his untruthful statements to IAD, which were made only six days before the notice of termination was issued.

Mr. Butler appealed his termination to the Office of Employee Appeals (OEA), which conducted an evidentiary hearing before an Administrative Judge (AJ). Sergeant Woodson, the IAD investigator, testified that she determined that Mr. Butler's conduct had "criminal overtones," because of the indications that he had been working on behalf of private clients during his work hours for MPD. MPD introduced evidence at the hearing that Mr. Butler acted unlawfully by accessing the electronic file containing Ms. Jackson's MPD medical records, which he had kept open for over fifty minutes. There also was evidence that Mr. Butler had made a false statement to IAD about his conduct.

Mr. Butler testified in his own defense, contending in essence that although he had opened Ms. Jackson's file, he had not actually reviewed her medical records.

The AJ found that Mr. Butler had unlawfully accessed Ms. Jackson's medical records and had falsely denied to MPD that he had done so. The AJ remanded the matter to MPD, however, for further consideration of the applicable penalty. On that point, the AJ concluded that Mr. Butler could be terminated for the misconduct at issue only if he had committed two prior offenses of misfeasance, but MPD had provided evidence only of one prior instance of misfeasance. The AJ therefore ordered MPD to reconsider its penalty of termination and inform the AJ of its ultimate penalty. MPD responded by adhering to its decision to terminate Mr. Butler and providing the AJ with evidence of a second prior offense of misfeasance by Mr. Butler.

The AJ issued an "initial decision" upholding the termination. The AJ determined that MPD did not violate the ninety-day rule. On that issue, the AJ indicated that the ninety-day period started running on September 12, 2013, when MPD was first notified by ORM of Mr. Butler's possible misconduct. The AJ further concluded that the ninety-day period was tolled from October 1, 2013, to September

25, 2014 -- from the day the matter was referred to the USAO until the day IAD issued its investigative report. The AJ therefore calculated that only eighteen untolled business days had passed when Mr. Butler received the notice of termination on October 6, 2014.

On the merits, the AJ determined that Mr. Butler committed misfeasance by accessing medical records without authorization; that Mr. Butler lied to IAD when he denied doing so; and that Mr. Butler had committed two prior offenses justifying the penalty of termination. Finally, the AJ overruled Mr. Butler's objection that the record had closed after the evidentiary hearing and that MPD was thus precluded from introducing new evidence of prior misfeasance on remand.

Mr. Butler appealed to the OEA Board. The Board upheld the AJ's determination that MPD did not violate the ninety-day rule, although the Board's analysis of that issue differed from that of the AJ. According to the Board, the ninety-day period was tolled starting on the day MPD was alerted about the incident, September 12, 2013. Without specifically addressing the time period from that date until October 1, 2013, when MPD referred the matter to the USAO, the Board stated that the ninety-day period was tolled because the allegations against Mr. Butler were the subject of a criminal investigation by the USAO. After determining that the

tolling stopped when the USAO issued its letter of declination on June 2, 2014, the Board concluded that MPD had timely issued the notice of termination within eighty-eight business days of the declination letter. The Board also upheld the AJ's authority to keep the record open after the remand order and before the initial decision, confirmed Mr. Butler's termination as the proper penalty, and declined to revisit the AJ's conclusions as to Mr. Butler's credibility.

Mr. Butler then sought review in Superior Court, which upheld the Board's ruling. On the timeliness issue, the Superior Court took yet a different approach. First, the Superior Court found that IAD had been criminally investigating Mr. Butler from the time it learned of his conduct on September 12, 2013. On this point, the Superior Court's reasoning was as follows: the September 18, 2013, letter to the USAO indicated that IAD viewed Mr. Butler's conduct as potentially criminal double-dipping; there was no evidence that IAD learned new and incriminating information about Mr. Butler's conduct between September 12, 2013, and September 18, 2013; it was therefore reasonable to infer that IAD viewed Mr. Butler's conduct as potentially criminal as of September 12, 2013.

The Superior Court also relied on an alternative rationale. According to the Superior Court, MPD was not on notice of Mr. Butler's unlawful accessing of

medical records -- the conduct that ultimately was the principal basis of the finding of misconduct -- until September 18, 2013. With respect to that conduct, the Superior Court reasoned, the ninety-day period did not start running until September 18, 2013, and the clock was tolled beginning on the same day by IAD's investigation into that potentially criminal conduct.

Either way, in the Superior Court's view, IAD's criminal investigation then tolled the ninety-day period until IAD referred the matter to the USAO. At that point, the USAO criminal investigation tolled the ninety-day period until the USAO's letter of declination on June 2, 2014. Based on these conclusions, the Superior Court determined that at most eighty-eight untolled business days had run at the time of the notice of termination, which therefore was timely.

On the merits, the Superior Court deferred to the AJ's credibility determinations and found that substantial evidence supported the finding that Mr. Butler made false statements during the IAD interview. Finally, the Superior Court concluded that the AJ was not required to explicitly reopen the record before remanding to MPD, and the AJ therefore permissibly considered additional evidence of other instances of misfeasance for penalty purposes before issuing the initial decision.

II.

When reviewing an OEA decision that has been reviewed by the Superior Court, "our scope of review is precisely the same as in administrative [cases] that come to us directly." *District of Columbia Fire & Med. Servs. Dep't v. District of Columbia Off. of Emp. Appeals*, 986 A.2d 419, 424 (D.C. 2010) (internal quotation marks omitted). We ordinarily defer to OEA's reasonable interpretation of statutes "under which [OEA] acts." *Id.* (internal quotation marks omitted). OEA's "decision must state findings of fact on each material contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings." *Id.* (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). We also "examine the agency record to determine whether . . . OEA's action was arbitrary, capricious, or an abuse of discretion." *Id.* (brackets and internal quotation marks omitted).

A.

Turning first to the timeliness of the notice of termination, we conclude that this issue must be remanded for further consideration by OEA.

1.

We cannot sustain the AJ's analysis of the timeliness issue, because the AJ treated the ninety-day period as tolled until IAD issued its investigative report in September 2014. Under § 5-1031(b), however, tolling continues only as long as the matter is the subject of a criminal investigation, and it appears to be undisputed that any potential criminal investigation ended when the USAO declined prosecution on June 2, 2014.

2.

For different reasons, we also cannot uphold the OEA Board's analysis of the timeliness issue. The Board apparently assumed that the matter was under criminal investigation by the USAO for the entire period from September 12, 2013, to June 2, 2014. In fact, however, the matter was not referred to the USAO until October 1,

2013. It is undisputed that eighty-eight business days passed between June 2, 2014, when the criminal investigation ended, and October 6, 2014, when the notice of termination was issued. Unless much of the time from September 12, 2013, to October 1, 2013, is subject to tolling, the notice of termination was therefore untimely.

MPD argues that all of the time from September 12, 2013, to October 1, 2013, was tolled, because Mr. Butler's conduct was under criminal investigation by MPD during that period. That argument runs into a procedural obstacle: neither the AJ nor the OEA Board relied on that rationale. "Generally, an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Apartment & Off. Bldg. Ass'n v. Pub. Serv. Comm'n*, 129 A.3d 925, 930 (D.C. 2016) (internal quotation marks omitted). There are exceptions to the general rule against affirming agency action on grounds that the agency did not rely upon and adequately explain. *E.g.*, *id.* (affirmance is permissible where remand would be futile because (a) it is clear agency would reach same result or (b) agency could permissibly reach only one conclusion). We conclude, however, that those exceptions do not apply in the present case.

The precise date on which Mr. Butler's conduct was first under criminal investigation by MPD may turn on unresolved matters of both law and fact. Section 5-1031(b) does not define the key phrase "subject of a criminal investigation." Our cases have not shed much light on the meaning of that phrase in the context of the beginning of a criminal investigation. *Cf. District of Columbia Fire & Med. Servs.*, 986 A.2d at 425 (stating that "[g]enerally an investigation is a comprehensive effort to clarify or better understand circumstances surrounding an incident or series of incidents").

MPD argues that conduct is under criminal investigation by MPD as soon as MPD (a) is aware of potentially criminal conduct and (b) has taken at least one concrete step to look into that conduct. Mr. Butler, however, appears to contend that in addition someone in MPD would have to subjectively view the investigation as potentially criminal rather than merely civil or disciplinary. We choose to leave to OEA in the first instance the question of how best to interpret the phrase "subject of a criminal investigation" in the current context. *See generally, e.g.*, *Brown v. District of Columbia Dep't of Emp't Servs.*, 83 A.3d 739, 751-52 (D.C. 2014) ("In accordance with our usual practice, we will not attempt to construe the statutory provisions before the agency charged with administering them has done so; we think it inadvisable for this court to attempt to review the issue on this record without a

clearer exposition by the agency of its statutory analysis in light of the facts of this case and the broader considerations presented by the issue.") (internal quotation marks omitted).

In MPD's view, the interpretation of "subject to a criminal investigation" is a pure issue of law as to which we owe no deference to OEA. As we have previously noted, however, this court generally defers to reasonable agency interpretations of ambiguous statutes under which the agency acts. *District of Columbia Fire & Med. Servs. Dep't*, 986 A.2d at 424-25. We have stated that principle not only as to OEA in general, but also more specifically in the context of OEA's interpretation of an earlier version of D.C. Code § 5-1031 itself. *Id.*

In arguing that we would owe no deference to OEA's interpretation of § 5-1031(b), MPD relies upon *District of Columbia v. District of Columbia Off. of Emp. Appeals*, 883 A.2d 124, 127 (D.C. 2005). It is true that the court in that case conducted de novo review in interpreting the phrase "conclusion of the criminal investigation" for purposes of a prior version of the time limit now found in § 5-1031. *Id.* at 126-28. The court, however, did not address the well-settled principle of administrative law generally requiring us to defer to reasonable agency interpretations of ambiguous statutes under which the agency acts. *Id.* Nor did the

court address our earlier cases applying that principle to OEA. *E.g.*, *Off. of District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994). We therefore do not interpret the decision in *District of Columbia v. District of Columbia Off. of Emp. Appeals* as sub silentio overturning the general principle that we will ordinarily defer to OEA's reasonable interpretation of statutes under which OEA acts. *See generally Thomas v. United States*, 731 A.2d 415, 420 n.6 (D.C. 1999) ("Where a division of this court fails to adhere to earlier controlling authority, we are required to follow the earlier decision rather than the later one."); *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) ("The rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question.") (emphasis and internal quotation marks omitted).

There are circumstances in which deference to an agency's interpretation of a statute is not warranted. For example, we will not defer to an agency's interpretation of a statute of general applicability. *Off. of People's Couns. v. Pub. Serv. Comm'n*, 955 A.2d 169, 173 (D.C. 2008). Because MPD has not argued that § 5-1031 is a statute of general applicability, we have no occasion to address that issue. Relatedly, questions can arise about deference when multiple agencies play a role in administering a given statute. *See, e.g.*, *id.* (citing cases suggesting that no deference is owed); *New Life Evangelistic Ctr. v. Sebelius*, 753 F. Supp. 2d 103, 123 (D.D.C.

2010) (suggesting that in such circumstances deference may be owed to agency with "primary responsibility"). The Public Employee Relations Board (PERB) would review challenges to arbitral decisions involving disputes as to whether employee discipline against an MPD officer was timely under § 5-1031. *See generally District of Columbia Metro. Police Dep't v. District of Columbia Pub. Emp. Rels. Bd.*, 144 A.3d 14, 16 (D.C. 2016) (PERB reviews arbitral decision in case involving MPD officer's challenge to employee discipline). Thus, it is possible that both OEA and PERB could express views as to the meaning of § 5-1031. MPD has not argued in this case, however, that the court would owe deference to PERB's interpretation of § 5-1031. Given the arguments that have been made before us in this case, we decide the case on the premise that we would owe deference to OEA's reasonable interpretation of § 5-1031.

MPD contends that in any event its proposed interpretation of the phrase "subject of a criminal investigation" is the only reasonable one, and thus there is no need for this court to hear in the first instance from OEA. We disagree. As this case illustrates, IAD has multiple functions, investigating conduct sometimes for internal disciplinary reasons, sometimes for possible criminal prosecution, and sometimes for both purposes. Consider a case in which (a) MPD is informed of an allegation that an MPD officer was standing on a sidewalk holding an open container of

alcohol, in violation of D.C. Code § 25-1001(a)(1) (2012 Repl. & 2020 Supp.), and (b) MPD immediately determines not to pursue criminal charges against the officer and instead starts up a purely disciplinary investigation. We think it far from clear that the ninety-day limit would be tolled during such a disciplinary investigation.

Whether Mr. Butler's conduct was the subject of a criminal investigation by MPD during some or all of the period from September 12, 2013, to October 1, 2013, thus might turn on how OEA would reasonably interpret the phrase "subject of a criminal investigation." The answer to that question might also turn on factual and other issues that OEA has not addressed, including most notably at what precise point Sergeant Woodson determined that the matter had "criminal overtones." For the reasons we have explained, we leave these matters to be determined in the first instance by OEA.

3.

We also are unable to uphold the Superior Court's ruling. As previously explained, the Superior Court identified two rationales for finding that the notice of termination was timely. First, the Superior Court inferred as a matter of fact that IAD viewed Mr. Butler's conduct as potentially criminal as of September 12, 2013.

Drawing such factual inferences, however, was beyond the scope of the Superior Court's authority in reviewing an agency decision. *See, e.g.*, *Murchison v. District of Columbia Dep't of Pub. Works*, 813 A.2d 203, 206 (D.C. 2002) (per curiam) ("When an administrative body fails to make findings on material, contested issues of fact, a reviewing court cannot fill in the gap and make its own findings. Rather, the court must remand the case to the agency for it to make the necessary factual determinations."; remanding case to Superior Court so that Superior Court could remand to OEA for OEA to make factual findings).

Second, the Superior Court reasoned that MPD was not on notice of Mr. Butler's unlawful accessing of medical records -- the conduct that ultimately was the principal basis of the finding of misconduct -- until September 18, 2013. OEA, however, did not rest on that rationale. As reviewing courts, neither the Superior Court nor this court can ordinarily uphold OEA's decision on a rationale that OEA did not rely upon in making its decision. *Apartment & Off. Bldg. Ass'n*, 129 A.3d at 930.

4.

Although Mr. Butler agrees that the decision of the OEA cannot be affirmed, he appears to suggest that this court could reverse OEA's timeliness ruling outright, without remanding the matter. We disagree.

First, Mr. Butler argues that the AJ found as a matter of fact that the ninety-day limit was not tolled from September 12, 2013, to October 1, 2013; that reviewing courts are obliged to defer to that finding, which was adequately supported by the record; and that, given that factual finding, the notice of proposed termination was untimely. It is true that the AJ treated the ninety-day period as running from September 12, 2013, to October 1, 2013. The AJ, however, did not explain its reason for doing so and made no finding, factual or otherwise, as to whether Mr. Butler's conduct was under criminal investigation by MPD from September 12, 2013, to October 1, 2013. Remand is thus necessary for OEA to further address the timeliness issue.

Second, Mr. Butler contends that some of MPD's arguments in this court are foreclosed because MPD did not take a cross-appeal from the Superior Court's decision upholding Mr. Butler's termination. We do not agree. The Superior Court's judgment was entirely favorable to MPD. When judgment is rendered in a given party's favor, that party need not cross-appeal to argue for affirmance on a

theory that is not aligned with the trial court's reasoning; that party only needs to cross-appeal if it seeks to change the trial court's judgment. *See, e.g.*, *In re O.L.*, 584 A.2d 1230, 1232 n.6 (D.C. 1990) ("[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.") (internal quotation marks omitted).

B.

For the foregoing reasons, we remand the case to OEA for further consideration of the timeliness question. Although the parties have briefed in this court a number of other issues related to the timeliness question, we conclude that those issues are better left to consideration if necessary on remand. *See generally, e.g.*, *District of Columbia Metro. Police Dep't v. Pinkard*, 801 A.2d 86, 90 (D.C. 2002) (declining to reach additional contentions when case was remanded to OEA for further review). We do, however, address two discrete remaining issues.

First, Mr. Butler disputes the AJ's finding that he lied to IAD about accessing medical records. We are not persuaded by Mr. Butler's argument on this point. The

AJ's finding was supported by substantial evidence, including that Ms. Jackson's medical records were open on Mr. Butler's computer for over fifty minutes. Although Mr. Butler continued to deny having actually reviewed Ms. Jackson's medical records, it was for the AJ to assess the credibility of that denial. *See, e.g.*, *Rocha-Guzmán v. District of Columbia Dep't of Emp't Servs.*, 170 A.3d 170, 175 (D.C. 2017) ("Credibility determinations are within the discretion of the [Administrative Law Judge (ALJ)], and typically are entitled to great weight due to the ALJ's unique ability to hear and observe witnesses first hand.") (internal quotation marks omitted); *Johnson v. District of Columbia Off. of Emp. Appeals*, 912 A.2d 1181, 1185 (D.C. 2006) ("[T]here can be substantial evidence on both sides of a dispute. If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings.") (internal quotation marks omitted).

Finally, Mr. Butler argues that OEA acted impermissibly by considering the information provided by MPD after the AJ remanded the matter to MPD. We see no error.

Mr. Butler relies on three OEA rules. First, 6-B DCMR § 629.1 (2020) provides that "When an evidentiary hearing has been provided, the record shall be

closed at the conclusion of the hearing, unless the Administrative Judge directs otherwise." Second, 6-B DCMR § 629.2 provides that "Once the record is closed, no additional evidence or argument shall be accepted into the record unless the Administrative Judge reopens the record pursuant to § 630.1." Finally, 6-B DCMR § 630.1 (2020) provides that "The Administrative Judge may reopen the record to receive further evidence or argument at any time prior to the issuance of the initial decision."

In Mr. Butler's view, these OEA rules precluded the AJ from considering the evidence provided by MPD on remand concerning an additional instance of misfeasance by Mr. Butler. The OEA Board concluded otherwise, reasoning that the AJ had the authority under OEA's rules to reopen the record before issuing its initial decision. We accord substantial deference to an agency's interpretation of its own regulations. *See, e.g.*, *District of Columbia Off. of Tax & Revenue v. BAE Sys. Enter. Sys., Inc.*, 56 A.3d 477, 481 (D.C. 2012) ("This court generally defers to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent with the regulations.") (internal quotation marks omitted). We conclude that the OEA Board's analysis is reasonable. The AJ's remand order was not designated as an initial decision, and the AJ can reasonably be viewed as having implicitly reopened the record before issuing the order that was designated

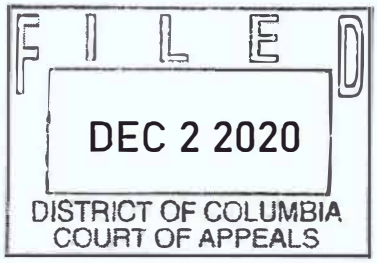
as the initial decision. We note, moreover, that Mr. Butler has not identified any concrete respect in which OEA's procedures unfairly prejudiced him, and he does not contest in this court the factual accuracy of the additional information provided by MPD on remand.

For the foregoing reasons, the judgment of the Superior Court is vacated and the case is remanded for the Superior Court to remand the case to the OEA for further proceedings.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-704

ANITHA L. DAVIS, APPELLANT,



V.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

&

DISTRICT OF COLUMBIA PUBLIC SCHOOLS, APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CAP-4867-16)

(Hon. Thomas J. Motley, Motions Judge)

(Argued May 22, 2019 Decided December 2, 2020)

Before BECKWITH, *Associate Judge*, FISHER, *Senior Judge*,* and EPSTEIN, *Associate Judge, Superior Court of the District of Columbia.***

MEMORANDUM OPINION AND JUDGMENT

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* Judge Fisher was an Associate Judge at the time of argument. His status changed to Senior Judge on August 23, 2020.

** Sitting by designation pursuant to D.C. Code § 11-707(a) (2012 Repl.).

PER CURIAM: Appellant Anitha Davis challenges the Office of Employee Appeals' (OEA's) denial of her petition to review the termination of her employment with the District of Columbia Public Schools (DCPS). Ms. Davis brought an administrative claim against DCPS because it eliminated her position at Terrell Elementary School through a reduction in force (RIF) and did not offer her an available position at a different school based on her seniority, as mandated by the collective bargaining agreement (CBA) between her union and DCPS. Because the OEA dismissed Ms. Davis's petition without resolving disputed issues relevant to its decision, we remand to allow the OEA Board to decide these issues in the first instance. We also reverse the Superior Court's ruling that the Abolishment Act (the Act) otherwise precludes Ms. Davis's claim.

I.

Ms. Davis worked for DCPS for more than 20 years. On May 24, 2013, DCPS notified Ms. Davis by letter that, as part of a RIF, it would eliminate her position as an administrative aide on August 16, 2013. On June 20, 2013, DCPS sent another letter notifying Ms. Davis that "[d]ue to the closure of Terrell" Elementary School, she would work on a detail as an administrative aide at Aiton Elementary School from June 25 until August 16, 2013. Both letters said that Ms. Davis might qualify for positions at other DCPS schools, but DCPS did not offer her a permanent position before the effective date of the RIF and therefore terminated her employment on August 16, 2013.

Representing herself, Ms. Davis appealed her separation to the OEA and requested a hearing on her contention that DCPS violated the CBA in conducting the RIF. The Administrative Judge (AJ) denied her request for a hearing and declined to address her argument regarding the CBA because he concluded it was "best characterized as [a] grievance[] and outside of the OEA's jurisdiction to adjudicate."

Ms. Davis then petitioned the full OEA Board to review the initial decision by the AJ. In her pro se brief, she argued that the AJ should have held an evidentiary hearing, which would have allowed her to show that during the period of May through August 2013, DCPS was violating a provision of the CBA, the

right to priority reemployment, by recruiting for or filling similar vacant positions without offering them to her.[1] Ms. Davis further argued that the subject matter of this claim fell squarely within the OEA's jurisdiction under D.C. Code § 1-606.03(a) (2016 Repl.).[2]

The OEA Board upheld the AJ's initial decision, stating that the OEA "has no jurisdiction over the issue of an agency's claim of budgetary shortfall, nor can OEA entertain an employee claim regarding how an agency elects to use its monetary resources for personnel services."

Ms. Davis appealed the decision to Superior Court, which upheld the OEA's decision. In support of its decision, the court relied on the Abolishment Act, D.C. Code § 1-624.08, which "affords District of Columbia agencies an opportunity each fiscal year to use a streamlined procedure to abolish positions that they have identified before February 1 of the fiscal year." *Stevens v. District of Columbia Dep't of Health*, 150 A.3d 307, 316 (D.C. 2016). The court applied subsection (f), which substantially limits review of a RIF conducted pursuant to the Act, D.C. Code § 1-624.08(f), to find that the CBA's guarantee of priority reemployment conflicted with the RIF statute and was therefore unenforceable.

II.

Ms. Davis argues that the OEA Board misinterpreted her claim as a challenge to the broader policy-based decision to eliminate her position rather than a challenge to the means through which DCPS terminated her employment—more specifically, its failure to offer her an available position based on her seniority as

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[1] Article IX, Section G of the CBA says: "Permanent employees adversely affected by a reduction-in-force shall be offered positions according to their seniority and for which they are qualified, when such positions become available for a period not to exceed two (2) years from the RIF."

[2] All subsequent citations to Title 1 of the D.C. Code are to the 2016 replacement volume.

required by the CBA. She contends that the OEA does have jurisdiction to decide this claim and that the AJ abused his discretion in denying her request for an evidentiary hearing. DCPS argues that the OEA Board properly decided it lacked jurisdiction because this claim did not fall under one of the categories that D.C. Code § 1-606.03(a) delineates as types of appeals over which the OEA has jurisdiction. Alternatively, DCPS contends, the Superior Court properly concluded that Ms. Davis's claim was barred from review because the RIF was conducted pursuant to the Act.

Although this is an appeal from the Superior Court, we review the OEA Board's decision as if it had been appealed to this court directly and confine our analysis to the administrative record. *See Stevens*, 150 A.3d at 311–12. "[W]e must affirm the OEA's decision so long as it is supported by substantial evidence in the record and otherwise in accordance with law." *Id.* at 312 (citation omitted). Our review of legal questions is generally de novo, but we "accord[] deference to an agency's interpretation of a statute that the agency administers, unless the interpretation is unreasonable or is inconsistent with the statutory language or purpose." *Johnson v. District of Columbia Dep't of Emp. Servs.*, 167 A.3d 1237, 1240 (D.C. 2017) (quoting *Placido v. District of Columbia Dep't of Emp. Servs.*, 92 A.3d 323, 326 (D.C. 2014)).

In this case, the OEA did not decide whether Ms. Davis had a claim under the statute governing appellate procedures for RIF-related challenges, D.C. Code § 1-606.03(a), which authorizes the OEA to consider appeals of "final agency decision[s] affecting a . . . reduction in force." Ms. Davis contends that DCPS's decision to terminate her employment through a RIF without affording her priority reemployment was a "final agency decision." In DCPS's view, there was no "final agency decision" in DCPS's failure to provide priority reemployment and Ms. Davis's claim centers around an additional benefit outside the scope of the RIF and § 1-606.03(a).

Ms. Davis argued to the OEA Board that she should have had a hearing to present evidence that DCPS recruited for and filled the administrative aide or similar vacant positions at other schools between May 24, 2013, when Ms. Davis received the RIF notice and August 16, 2013 when DCPS terminated Ms. Davis's employment, in order to demonstrate that DCPS violated the CBA by not offering her priority employment over these hires based on her seniority. The OEA Board,

however, incorrectly interpreted Ms. Davis's claim as a challenge to DCPS's decision to terminate her *position* at Terrell through a RIF, and thus deemed it outside the jurisdiction of the OEA, precluding the need for an evidentiary hearing. The OEA therefore did not address whether DCPS's failure to offer Ms. Davis priority reemployment at another school was a "decision affecting a . . . reduction in force" within the meaning of § 1-606.03(a) or whether it was a "final agency decision" within the meaning of this statute.

DCPS argues that we can affirm on the alternative ground on which the Superior Court based its decision, which is that DCPS initiated the RIF under the Act and the priority reemployment provisions of the CBA conflict with the Act. Citing *Stevens v. District of Columbia Department of Health*,[3] DCPS further asserts that by not challenging it in this court, Ms. Davis has conceded the accuracy of the trial court's assumption that the Act applies. At oral argument, Ms. Davis countered that she was not required, in order to avoid a waiver, to respond to everything in the Superior Court's order because this court's focus is upon the OEA Board's decision, the Superior Court's reference to the Act was unrelated to the jurisdictional question, and this court should not entertain a waiver argument DCPS raised for the first time on appeal.

The record does not establish whether the RIF that preceded the termination of Ms. Davis's employment with DCPS was pursuant to the Act, and DCPS did not rely on this argument before the AJ or the OEA Board. In fact, DCPS acknowledges in its brief that the Act might not apply to the RIF in Ms. Davis's case because our court has decided that the Act does not necessarily apply to every RIF. *See Stevens*, 150 A.3d at 316 (concluding the Act "affords District of Columbia agencies an *opportunity* each fiscal year to use a streamlined procedure to abolish positions that they have identified before February 1 of the fiscal year") (emphasis added).

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[3] 150 A.3d at 321–322 (rejecting employees' assertion that the Act did not preclude their claims where the employees presented no evidence of noncompliance with the Act because 6-B DCMR § 628 places the burden of proof for jurisdictional questions on employees).

Nevertheless, DCPS asks us to assume that the Act applies because Ms. Davis failed to carry her burden of showing that this was *not* a RIF under the Act, pursuant to *Stevens*. *Id.* at 321–22. In *Stevens*, however, the court could conclude that it was dealing with a RIF under the Act because it had the benefit of an "undisputed record that was before the OEA [that] established that, prior to February 1, 2009, [the agency] made a final determination that certain identified positions, including the positions held by appellants, were to be abolished during [the] fiscal year." *Id.* at 321. In this case, DCPS itself acknowledges that "the record does not reflect when DCPS decided to close Terrell Elementary School." The only potential evidence in the record on this point is the letter dated May 24, 2013, alerting Ms. Davis of her impending termination. Under these circumstances, Ms. Davis did not waive any claim that DCPS's RIF did not fall under the Act, and she did not forfeit the opportunity to present evidence to that effect.

In light of the above considerations, a remand is necessary. We leave it to the OEA's sound discretion to decide what issues it should address on remand. For instance, if the OEA addresses on remand DCPS's argument that the Act bars Ms. Davis's claim, the OEA should determine whether DCPS conducted the RIF under the Act (or whether the OEA Board should remand to the AJ for additional factfinding) and, if DCPS conducted the RIF under the Act, whether that precludes Ms. Davis's claim. If the OEA concludes that the Act does not apply or does not preclude Ms. Davis's claim, the OEA could resolve the parties' differing interpretations of § 1-606.03(a), particularly the terms "final agency decision" and "affecting a . . . reduction in force." The OEA may also choose on remand to address the issue on which the AJ relied, which is that Ms. Davis's claim that DCPS violated her rights under the CBA is best characterized as a grievance outside the scope of the OEA's review authority.[4] The OEA can also address

[4] DCPS argues that Ms. Davis's claim concerning priority reemployment is best characterized as a grievance even if it arises not under the CBA but under the RIF statutes and regulations, which provide the same priority reemployment benefit contained in the CBA. *See* D.C. Code § 1-624.02(a)(3); 6B DCMR § 2427; D.C. Code § 1-624.08(h). Whether the OEA has jurisdiction over a claim that DCPS violated a statutory or regulatory right to priority reemployment is an appropriate question for the OEA Board to address on remand.

whether, consistent with *Brown v. Watts*, 993 A.2d 529, 533–34 (D.C. 2010), Ms. Davis had the procedural choice to raise the issue pursuant to the OEA appeals procedure even if she also had the right to use the negotiated grievance procedure.

III.

For the foregoing reasons, we reverse the judgment of the Superior Court, vacate the OEA's decision, and remand for further proceedings consistent with this opinion.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies sent to:

Honorable Thomas J. Motley

Director, Civil Division
QMU

Michael A. DeBernardis, Esquire

Sheila G. Barfield, Esquire

Loren L. AliKhan, Esquire
Solicitor General for the District of Columbia

ATTACHMENT #13

Office of Employee Appeals (OEA)

Annual Freedom of Information Act Report for Fiscal Year 2020

October 1, 2019 through September 30, 2020

FOIA Officer Reporting Sheila G. Barfield

PROCESSING OF FOIA REQUESTS

1. Number of FOIA requests received during reporting period…….0…….....
2. Number of FOIA requests pending on October 1,2019……0……...
3. Number of FOIA requests pending on September 30,2020……0…….
4. The average number of days unfilled requests have been pending before each public body as of September 30, 2020
   ……N/A……..

DISPOSITION OF FOIA REQUESTS

5. Number of requests granted, in whole……N/A……...
6. Number of requests granted, in part, denied, in part……N/A……..
7. Number of requests denied, in whole……N/A……
8. Number of requests withdrawn……N/A……..
9. Number of requests referred or forwarded to other public bodies……N/A……...
10. Other disposition ……N/A……..

NUMBER OF REQUESTS THAT RELIED UPON EACH FOIA EXEMPTION

11. Exemption 1 - D.C. Official Code § 2-534(a)(1)……N/A…….....
12. Exemption 2 - D.C. Official Code § 2-534(a)(2)……N/A…….....
13. Exemption 3 - D.C. Official Code § 2-534(a)(3)
    - Subcategory(A)…N/A……
    - Subcategory (B) N/A…….……
    - Subcategory (C) N/A…….……
    - Subcategory (D) N/A…….....
    - Subcategory (E) N/A…….....
    - Subcategory (F) N/A……
14. Exemption 4 - D.C. Official Code § 2-534(a)(4)……N/A……...…..

15. Exemption 5 - D.C. Official Code § 2-534(a)(5)……N/A……..…….....

16. Exemption 6 - D.C. Official Code § 2-534(a)(6)

    Subcategory (A)……..…N/A

    Subcategory (B)……N/A

17. Exemption 7 - D.C. Official Code § 2-534(a)(7) N/A

18. Exemption 8 - D.C. Official Code § 2-534(a)(8) N/A

19. Exemption 9 - D.C. Official Code § 2-534(a)(9) N/A

20. Exemption 10 - D.C. Official Code § 2-534(a)(10) N/A

21. Exemption 11 - D.C. Official Code § 2-534(a)(11) N/A

22. Exemption 12 - D.C. Official Code § 2-534(a)(12) N/A

TIME-FRAMES FOR PROCESSING FOIA REQUESTS

23. Number of FOIA requests processed within 15 days……N/A…….

24. Number of FOIA requests processed between 16 and 25 days……N/A……..

25. Number of FOIA requests processed in 26 days or more……N/A……..

26. Median number of days to process FOIA Requests……N/A…….……

RESOURCES ALLOCATED TO PROCESSING FOIA REQUESTS

27. Number of staff hours devoted to processing FOIA requests……N/A……

28. Total dollar amount expended by public body for processing FOIA requests…N/A……...

FEES FOR PROCESSING FOIA REQUESTS

29. Total amount of fees collected by public body…N/A……...……

PROSECUTIONS PURSUANT TO SECTION 207(d) OF THE D.C. FOIA

30. Number of employees found guilty of a misdemeanor for arbitrarily or capriciously violating any provision of the District of Columbia Freedom of Information Act…N/A……..….

QUALITATIVE DESCRIPTION OR SUMMARY STATEMENT

Pursuant to section 208(a)(9) of the D.C. FOIA, provide in the space below or as an attachment, "[a] qualitative description or summary statement, and conclusions drawn from the data regarding compliance [with the provisions of the Act]."

No FOIA requests were submitted to OEA during Fiscal Year 2020.