

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on June 1, 2023, at 9:00 a.m. The Board will meet remotely. Below is the agenda for the meeting.

Members of the public are welcome to observe the meeting. In order to attend the meeting, please visit: <https://dcnet.webex.com/dcnet/j.php?MTID=m961d3d5eac424b76bee9e2783d659c87>

Password: board (26274 from phones and video systems)

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Questions about the meeting may be directed to wynter.clarke@dc.gov.

Agenda

D.C. OFFICE OF EMPLOYEE APPEALS ("OEA") BOARD MEETING

Thursday, June 1, 2023, at 9:00 a.m.

Location: Virtual Meeting via Webex

I. Call to Order

II. Ascertainment of Quorum

III. Adoption of Agenda

IV. Minutes Reviewed from Previous Meeting

V. New Business

A. Public Comments on Petitions for Review

B. Summary of Cases

- 1. Employee v. D.C. Public Schools, OEA Matter No. 1601-0066-22** -- Employee worked as a Custodian with D.C. Public Schools ("Agency"). On July 1, 2022, Agency issued a notice of termination to Employee. The notice provided that under IMPACT, Agency's assessment system for school-based personnel, an employee whose final IMPACT rating declines between two consecutive years from "Developing" to "Minimally Effective," was subject to separation. Employee was rated "Developing" for the 2020-2021 school year, and his final IMPACT rating for the 2021-2022 school year was "Minimally Effective." As a result, Agency terminated Employee, and he was separated effective July 30, 2022.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on July 15, 2022. He argued that he was unaware of his low IMPACT rating because he was on approved Family and Medical Leave Act (“FMLA”) from April 27, 2022, until June 10, 2022. Moreover, he alleged that he was not aware of the scheduled June 12, 2022, IMPACT conference with his principal. Employee explained that because of his absence from work, he was not able to prove his work ability during the period in question. Accordingly, he requested that he be reinstated to his position because of Agency’s unfair practices related to his IMPACT evaluations.

Agency filed its Answer to Employee’s Petition for Appeal on August 30, 2022. It asserted that it properly followed the IMPACT process. Agency explained that Employee was terminated because of a “Developing” rating for the 2020-2021 school year and a “Minimally Effective” rating for the 2021-2022 school year. As for Employee’s FMLA claim, Agency argued that pursuant to its Office of Equity policy, an employee may still be rated for IMPACT, if they were continuously available for more than half of the school year. It contended that Employee was only absent during the second to last month of the 2021-2022 school year; thus, he was available to be evaluated for over seven months in order to receive an IMPACT rating. Moreover, Agency asserted that two attempts were made to schedule the post-evaluation conference, with the second attempt occurring on June 15, 2022, five days after Employee returned from his FMLA absence. Therefore, it opined that Employee was properly terminated under IMPACT.

On February 21, 2023, the AJ issued an Initial Decision. She explained that according to the IMPACT process, as a Custodian, Employee had two assessment cycles, which were to occur in January and June of each school year. Additionally, the AJ noted that as part of the IMPACT process, employees are entitled to a conference with an administrator as part of each assessment cycle. However, she found that Agency did not comply with the IMPACT process and held that a portion of Employee’s 2021-2022 evaluation was invalid.

The AJ determined that Employee worked in an on-duty status for more than half of 2021-2022 school year; thus, he could be evaluated. However, she held that although Employee’s IMPACT assessment was valid, Agency committed a procedural error by failing to provide him with a post-assessment conference and did not make two attempts prior to the cycle deadline to schedule a conference, as required under IMPACT. The AJ determined that Employee had one conference on February 11, 2022. According to her, the deadline for the second assessment was June 9, 2022. The AJ found that Agency first attempted to schedule the conference on June 8, 2022. However, Employee was on FMLA on June 9, 2022. As a result, the AJ held that because Employee was not in duty status on the day of the scheduled conference, Agency could not hold it against him. The AJ found that Agency made a second attempt to schedule the conference on June 15, 2022. However, because both conference attempts were to happen before the June 9, 2022, cycle deadline, she ruled that Employee’s assessment was invalid. Consequently, the AJ concluded that Agency lacked cause to terminate Employee. As a result, Agency was ordered to reinstate Employee to his last position of record; or a comparable position; and reimburse Employee all back-pay and benefits lost because of the termination action.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on March 17, 2022. It argues that the Initial Decision is not supported by substantial evidence. Specifically, Agency contends that the AJ erred in concluding that its two scheduling attempts were invalid without granting Agency an opportunity to resolve the discrepancy. Agency explains that its IMPACT policy provides that if an employee is on extended leave at the time of scheduling the conference, there does not

need to be any attempt to schedule the conference. Thus, its attempt to schedule the conference was a courtesy, not a requirement. Therefore, Agency requests that the Board reverse the Initial Decision or in the alternative, remand the matter to the AJ to address whether Agency was required to attempt to schedule a post-assessment conference with Employee.

On May 2, 2023, Employee filed his Reply to Agency's Petition for Review. He contends that Agency's attempts to schedule a post-assessment conference should not be considered because he did not have access to his work email while he was out on FMLA. Moreover, Employee asserts that while he was provided an opportunity to discuss his "Developing" rating for the 2020-2021 school year with an administrator, he was not offered the same opportunity to review the "Minimally Effective" rating he received for the 2021-2022 school year. Therefore, he argues that Agency failed to comply with the IMPACT process by not providing the required post-assessment conference.

2. **Employee v. D.C. Fire & Emergency Services, OEA Matter No. 1601-0025-22** – Employee worked as a Firefighter/Emergency Medical Technician ("FF/EMT") with D.C. Fire & Emergency Services ("Agency/EMS"). Employee was charged with District Personnel Manual ("DPM") § 1603.3(f)(3) neglect of duty and DPM § 1603.3(f)(9) unreasonable failure to give assistance to the public, as a result of violating Agency's Bulletin No. 3 (Patient Bill of Rights); Order Book Article XXIV (Sections 9 and 10); Department EMS Protocols, and Special Order No. 54 (Series 2012). On June 25, 2021, and August 4, 2021, Employee appeared before a Fire Trial Board ("Trial Board"). He pleaded not guilty to Charge No. 1 and Charge No. 2. The Trial Board subsequently determined that Employee was guilty on both charges and recommended termination. On November 1, 2021, the Agency Chief accepted the Trial Board's recommendation and issued a Final Notice of Termination. Employee's termination became effective on November 6, 2021.

The AJ issued an Initial Decision on January 10, 2023. Regarding Charge No. 1, Specification No. 1, and Charge No. 2, Specification No. 1, the AJ held that Agency met its burden of proof in establishing that Employee neglected his duties and failed to provide assistance to a member of the public during the June 23, 2020, emergency call. She provided that the record supported a finding that Employee violated Special Order No. 54 because he failed to obtain a refusal of treatment from the patient; improperly documented the patient's refusal or treatment; and improperly characterized the initial call as "no patient contact" instead of "refusal." The AJ went on to discuss that Employee's failure to thoroughly and truthfully document the patient's vital signs violated Bulletin No. 3 of the Patient Bill of Rights. As such, she determined that the Panel's findings of fact regarding Employee's conduct were based on substantial evidence.

With respect to whether Agency committed a harmful procedural error, the AJ first addressed whether Agency's reliance on the 2012 DPM was proper even though a newer version of the regulations existed at the time. The AJ provided that Chapter 6-B of the D.C. Municipal Regulations ("DCMR") and Chapter 16 of the DPM regulate the manner in which District agencies administer adverse actions. Since Employee was terminated effective November 6, 2021, and the applicable version of the DPM went into effect in the District on June 12, 2019, the AJ concluded that all adverse actions commenced after this date were subject to the new regulations.

The AJ also highlighted Order Book, Article VII, Section 1, which provides that disciplinary actions against firefighters at the rank of captain and below shall be governed

by the CBA and Chapter 16 of the DPM, and in the event of a conflict between the CBA and DPM Chapter 16, the CBA shall prevail. She disagreed with Agency's argument that it was required to use the 2012 DPM pursuant to the CBA and the Order Book, finding that Article 31 only required disciplinary procedures to be governed by the applicable provisions of Chapter 16. The AJ found unpersuasive the supporting case law provided by Agency in support of its position that it was legally precluded from implementing the new DPM regulations. She held that the instant matter was distinguishable because Employee's union did not make a request to bargain over the proposed changes to Chapter 16 of the DPM.

Additionally, the AJ determined that the parties were not engaged in impact and effects bargaining when the adverse action was initiated against Employee; Agency assured Local 36 that any proposed changes to Chapter 16 would not impact its members but did not state that it would continue using the 2012 DPM; and the changes did not affect the mandatorily negotiated terms and conditions of employment subject to the mandatory duty to bargain. Since Employee was charged with neglect of duty and unreasonable failure to give assistance to the public pursuant to the Order Book and the 2012 DPM when the current and applicable version was the 2019 DPM, the AJ held that Agency's utilization of an out-of-date DPM iteration constituted a harmful procedural error.

Concerning the substantive charges, the AJ explained that Section 1603.3(f)(3) did not exist in the 2019 DPM because the 2017 version moved all the adverse action charges to Section 1605. Thus, a charge of neglect of duty could now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e). Likewise, a charge of unreasonable failure to give assistance to the public under the 2012 DPM was previously located in Section 1603.3(f)(9), but the 2017 update to the DPM and subsequent versions of the regulations did not have a corresponding provision for this cause of action. Because there were substantive changes that resulted from the 2017 and subsequent versions of the DPM, with regard to the charges and penalties for employees, the AJ was unable to ascertain which charges should have been levied against Employee had Agency utilized the correct version of the regulations. As a result, she opined that Agency's failure to provide Employee with the specific charges based on the appropriate version of the DPM deprived him of a fair opportunity to oppose the proposed removal action. Since Agency failed to utilize the correct DPM, she assessed that Employee could not adequately defend himself against the charges in the proposed notice. Consequently, the AJ dismissed Charge No. 1 and Charge No. 2.

As it related to Employee's argument that Agency violated Article 31, Section B (5) of the CBA by failing to hold a Trial Board hearing within 180 days of the receipt of the IWR, the AJ held that Employee's hearing was conducted 217 days after the IWR was received, which violated the terms of the agreement. However, while Section B (5) was a bargained-for provision between the parties, the AJ surmised that the OEA Board's holding in *Quamina v. Department of Youth Rehabilitation Services* provided guidance in determining whether the language of a CBA was directory, rather than mandatory in nature. Subsection B (5) of the CBA in this matter did not specify a consequence for Agency's violation of the prescribed time limit; therefore, the AJ reasoned that the public interest to adjudicate this matter on its merits outweighed Agency's procedural delay in conducting a Trial Board hearing within 180 days. Therefore, she concluded that Agency's error was harmless.

Finally, in determining whether the penalty was appropriate, the AJ relied on the holding in *Stokes v. District of Columbia*, which requires this Office to assess whether the selected penalty was within the range allowed by law, regulation, or any Table of

Illustrative Actions; whether the penalty is based on a consideration of the relevant factors; and whether there was a clear error of judgment by Agency. Although the AJ concluded that Agency established cause for neglect of duty under both Charge No. 1, Specification No. 1, and Charge No. 2, Specification No. 1, she found that Agency nonetheless committed a harmful procedural error against Employee as it related to the charge of failure to provide assistance to the public because this charge did not exist in the 2019 DPM. Further, Agency failed to provide a breakdown of the penalty with respect to each of the two causes of action under Charges No. 1 and 2; therefore, the AJ believed that it would be improper to essentially estimate what the appropriate penalty would have been had Agency used the correct DPM version. Consequently, she concluded that the penalty of termination was inappropriate under the circumstances. Therefore, Agency's termination action was reversed, and Agency was ordered to reimburse Employee all backpay and benefits lost as a result of the termination action.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on February 14, 2023. It argues that the AJ erred by rendering a decision on an issue not raised by the parties, namely in determining that Agency erred in utilizing the 2012 DPM. Because neither party raised the issue of whether it was permissible to rely on an out-of-date version of the regulations, Agency explains that it was nonetheless improper for the AJ to address this issue *sua sponte* because Employee's failure to raise his argument at the hearing level constituted a waiver of the issue. Agency further claims that it was required to rely on the Order Book and the 2012 DPM because the amendments to the DPM would modify bargained-for procedures and because impact and effects bargaining have not yet occurred between Agency and Employee's union. It echoes its previous position that relying on any other iteration of the DPM would violate the principles of labor law. Alternatively, Agency suggests that if its reliance on the 2012 DPM constituted an error, it was harmless. Additionally, it suggests that the bargaining of the revised regulations is a question of material fact that requires additional fact finding through the reopening of the record. Consequently, Agency asks that the Board grant its Petition for Review.

Employee filed an Opposition to Agency's Petition for Review on May 2, 2023. Employee cites to *Employee v. D.C. Fire & Emergency Services*, OEA Matter No. 1601-0040-21, in which this Board was presented with nearly identical arguments to this matter. He states that the Board previously held that Agency's use of the 2012 DPM in the aforementioned appeal constituted a harmful procedural error and notes that the agency is the same; the charges against the employees are the same; and the issue of proper advance notice regarding the charges levied against the employees are the same. Thus, it is his position that the Initial Decision is based on substantial evidence. Employee, again, argues that the Order Book and the CBA do not limit Agency to use of the 2012 DPM and that contrary to Agency's argument, when read in conjunction, the governing authorities only require the use of the applicable version of the regulations. Additionally, Employee provides that the parties have not engaged in impact and effects bargaining over the continued use of the 2012 DPM. Employee objects to Agency's request to have this matter remanded for additional fact finding because the parameters provided in *Pinkard* render this case ineligible for remand. Therefore, he requests that the Board uphold the Initial Decision and deny Agency's Petition for Review.

- 3. Employee v. Metropolitan Police Department, OEA Matter No. 1601-0072-22—** Employee worked as a CCTV Evidence Specialist with the Metropolitan Police Department ("Agency"). On June 3, 2022, Employee was served with a fifteen-day Advanced Notice of Proposed Adverse Action based on charges of conduct prejudicial

to the District government; conduct that an employee should reasonably know is a violation of the law; and off-duty conduct that adversely affects the employee's job performance or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position. The charges stemmed from Employee's reckless driving by operating his motor vehicle at 106 miles per hour in a seventy miles per hour zone on July 13, 2015; failing to appear at the Smyth County General District Court on September 2, 2015; being arrested by the Metropolitan Washington Airport Authority Police Department for an associated capias warrant on November 11, 2015; and being found guilty of reckless driving in the Commonwealth of Virginia on January 27, 2016. Initially, Agency's notice proposed a thirty-day suspension. However, on July 29, 2022, Agency issued a final decision, reducing the imposed penalty from thirty days to a fifteen-day suspension with seven days held in abeyance. Thereafter, on November 22, 2022, Agency unilaterally rescinded the seven days held in abeyance and updated Employee's records to reflect that the final imposed discipline was an eight-day suspension. Employee served the suspension from September 6, 2022, through September 15, 2022.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 3, 2022. He argued that this was his first disciplinary offense, and that Agency never informed him of any policies related to his alleged violations of conduct. Employee characterized Agency's actions as a "fishing expedition" and requested that the imposed suspension be reversed and removed from his personnel record. Agency filed its answer on September 2, 2022. It denied Employee's claims and requested a hearing on the substantive arguments.

An OEA Administrative Judge ("AJ") held a prehearing conference on November 16, 2022, and concluded that this Office retained jurisdiction over Employee's appeal after eliciting the parties' oral arguments. The parties were subsequently ordered to submit briefs addressing whether Agency established cause to impose discipline upon Employee, and if so, whether the penalty was appropriate.

On December 2, 2022, Agency filed a Motion to Dismiss, asserting that OEA lacked jurisdiction over the instant appeal. It provided that under D.C. Code § 1-606.03(a), OEA's jurisdiction is explicitly limited to suspensions of ten days or more and that if an employee serves less than ten suspension days, the agency's action resulting in that suspension is not appealable to this Office. Agency went on to explain that on November 22, 2022, it unilaterally rescinded the seven days held in abeyance and confirmed that Employee's final discipline was an eight-day suspension. Therefore, Agency reasoned that the suspension served by Employee did not meet the threshold for OEA's jurisdiction because it was less than ten days. Consequently, it requested that Employee's appeal be dismissed.

The AJ issued an Initial Decision on January 26, 2023. He highlighted OEA's governing statute, Title 1, Chapter 6, Subchapter VI of the D.C. Code (2001), which provides *inter alia* that an employee may appeal to this Office suspensions for ten days or more. He explained that when Employee filed his appeal with this Office, he was appealing a fifteen-day suspension with seven days held in abeyance. However, on November 22, 2022, Agency unilaterally rescinded the seven days held in abeyance and updated the record to reflect that Employee's final imposed discipline was only an eight-day suspension. The AJ agreed with Agency's position that given the instant circumstances, OEA should only focus on the actual suspension time imposed. According to his assessment, Employee failed to suffer an enduring harm that was appealable to OEA. The AJ noted that the adverse action was rescinded with Employee only having suffered

an eight-day suspension. Thus, he reasoned that Employee never endured the subject seven days of suspension and would not have the threat of an impending adverse action as he continued to be employed by Agency. As a result, he concluded that at best, the current appeal constituted a corrective action. Consequently, Employee's appeal was dismissed for lack of jurisdiction.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on February 28, 2023. He contends that contrary to the AJ's findings, this Office retains the jurisdiction to adjudicate Agency's suspension action. Employee believes that Agency erred by unilaterally reducing the proposed suspension from fifteen days to eight days. He also asserts that Agency engaged in procedural errors when it initiated the instant adverse action. Specifically, he submits that Agency violated General Order PER-201.22, OEA Rule 605, and Chapter 16, Sections 1613.1 and 1623 of the DPM. According to Employee, the imposed penalty is excessive in light of his good record with Agency. Additionally, he takes issue with the amount of time Agency took to initiate its adverse action. Employee requests that the Board find that OEA may exercise jurisdiction over his appeal. He further asks that the suspension action be removed from his personnel record; Agency restore his leave balances and benefits; the AJ impose punitive measures against Agency; and that the case be remanded to be decided on its merits.

- C. Deliberations** – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Code § 2-575(b)(13).
- D. Open Portion Resumes**
- E. Final Votes on Cases**
- F. Public Comments**

VI. Adjournment

“This meeting is governed by the Open Meetings Act. Please address any questions or complaints arising under this meeting to the Office of Open Government at opengovoffice@dc.gov.”