DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on November 18, 2020, at 11:00 a.m. Considering the public health crisis, 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/onstage/g.php?MTID=e57fd5631b92f8342d07b3554409b9978. Event password: board

You can also visit https://globalpage-prod.webex.com/join. To join the meeting, enter 172 533 7980 for the meeting number.

We recommend logging in ten (10) minutes before the meeting starts. In order to access Webex, laptop or desktop computer users **must** use Google Chrome, Firefox, or Microsoft Edge Browsers.

Smartphone/Tablets or iPad user must first go to the App Store, download the Webex App (Cisco Webex Meetings), enter the Access Code, and enter your name, email address, and click Join. It is recommended that a laptop or desktop computer be utilized for this platform.

Your computer, tablet, or smartphone's built-in speaker and microphone will be used in the virtual meeting unless you use a headset. Headsets provide better sound quality and privacy.

If you do not have access to the internet, please call-in toll number (US/Canada) 1-650-479-3208, Access code: 172 533 7980.

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

Agenda
D.C. OFFICE OF EMPLOYEE APPEALS ("OEA") BOARD MEETING
Wednesday, November 18, 2020 at 11:00 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. Eugene Goforth v. Department of Public Works, OEA Matter No. 1601-0004-19 — Employee worked as a Heavy Mobile Equipment Mechanic for the Department of Public Works. On September 7, 2018, Agency issued a Notice of Final Decision on Summary

Removal. The notice provided that Employee was being summarily removed under District Personnel Manual § 1612.2(c) for "conduct detrimental to the public health, safety or welfare" and §§ 1605.4(h) and 1607.2(h)(6) for "unlawful possession of controlled substances and paraphernalia: interfering with or refusing or failing to submit to a properly ordered or authorized drug test."

Employee filed a Petition for Appeal on October 5, 2018. He asserted that he did not refuse to submit to a random drug test. Employee explained that he provided an initial specimen sample, and according to the testing collector, the sample did not meet the temperature requirements. Employee claimed that the collector failed to read the temperature strip affixed to the outside of the collection container to determine the actual temperature, and she failed to mark the appropriate box on the Federal Drug Testing Custody and Control Form. According to Employee, the collector discarded his sample and marked the "None Provided" box on the form. It was Employee's position that if the temperature was out of range, the collector should have completed the collection and immediately initiated a new collection under direct observation. He reasoned that both samples should have been submitted for testing with the appropriate markings on the form. Therefore, Employee requested that the summary removal action be removed from his personnel file; that he be reinstated to his position; that he receive back pay and benefits lost as a result of the termination; and that he receive a reimbursement of attorney's fees.

Agency filed an Answer to the Petition for Appeal on November 8, 2018. It argued that Employee's position required a Commercial Driver's License ("CDL"). According to Agency, CDL holders were subjected to random drug testing procedures. It provided that Employee's first sample was outside of the required temperature range. Agency further explained that under 49 Code of Federal Regulations ("CFR") § 40.65(h)(5), when an initial sample is out of the acceptable temperature range, a drug test is not considered complete until the second sample is collected. Additionally, Agency provided that pursuant to 49 CFR § 40.191(a)(2), leaving a testing facility before providing a sample is considered a refusal, which results in a positive test result. Agency also asserted that there were multiple witness accounts that Employee willfully refused to provide a second urine sample under direct observation, which is a violation of section 1605.4(h) of the DPM. It was Agency's position that Employee had an obligation to provide a second sample under direct observation to comply with the Department of Transportation ("DOT") regulations and District policy. Agency noted that it considered whether there were mitigating, aggravating, or other relevant factors, as provided in *Douglas v. Veterans Administration*, 5 MPSR 280 (1981). As a result, it requested that Employee's removal action be upheld.

The AJ issued his Initial Decision on April 30, 2020. As it related to the conduct detrimental to the public health, safety, or welfare charge, the AJ found that Employee's refusal to submit to the drug test did not rise to the level of conduct detrimental to the public health, safety, or welfare. However, he did find that pursuant to DPM § 1607.2(h)(6), Agency had cause for Employee's refusal or failure to submit to a properly ordered or authorized drug test. The AJ also disagreed with Employee's argument that the Federal Drug Testing and Custody and Control Form was incomplete. He ruled that Employee's argument failed because although the "Yes" or "No" box was not checked, the response to the question was clearly indicated in the remarks section which provided "donor temperature out of range." Thus, the AJ held that the remarks indicated that the temperature was outside of the acceptable range of 90 to 100

degrees Fahrenheit. Therefore, he determined that the omission of the "Yes" or "No" box being checked was *de minimis*.

Moreover, the AJ opined that Employee failed to provide evidence that the collector prematurely discarded the initial specimen. He reasoned that the initial specimen was only discarded after Employee refused to submit to a drug test under direct observation. The AJ further explained that since a second specimen was not provided under direct observation, the DOT provisions pursuant to 49 CFR Part 40, §§ 40.191(a)(4) and 40.67, permitted the initial specimen to be discarded. Therefore, he found that Employee's specimen was not prematurely discarded. Finally, regarding the direct observation process, the AJ opined that despite Employee's discomfort, Agency – through Metro Lab – was within its authority to require Employee to provide a new sample under direct observation. As for the penalty, the AJ held that the Table of Illustrative Actions in the DPM provided that removal was an appropriate penalty for the first offense of refusing or failing to submit to a properly authorized drug test. Accordingly, the AJ ordered that Agency's termination action be upheld.

On June 9, 2020, Employee filed a Petition for Review with the OEA Board. Employee submits many of the same arguments raised throughout his appeal. He also argues that Agency failed to properly apply the *Douglas* factors and consider the mitigating factors, such as harassment, job tensions, and his mental health issues. Therefore, Employee requests that the Initial Decision be withdrawn; his summary removal be revoked; or that the record be reopened so that an evidentiary hearing can be held.

Agency filed its Opposition to Employee's Petition for Review on July 7, 2020. As it relates to Employee's argument regarding the consideration of mitigating factors, Agency provides that Employee did not mention any concerns or alleged issues related to his mental health until after he was placed on administrative leave. Moreover, Agency asserts that Employee failed to provide any medical documentation to prove that he suffered from Post-Traumatic Stress Disorder or any other alleged mental illness at the time he refused to submit to the drug test, or that his refusal was linked to such a mental impairment. Therefore, it held that it correctly found no mitigating circumstances and requests that the Initial Decision be upheld.

2. Charles Anthony v. Department of Health, OEA Matter No. 1601-0051-18 — Employee worked as a Police Officer with the Metropolitan Police Department. On September 8, 2017, Agency issued a Notice of Proposed Adverse Action charging Employee with Inefficiency; Refusal/Failure to Submit to Urinalysis or Breathalyzer Testing; Failure to Obey Orders; and Insubordination. On March 7, 2018, Agency issued its Final Notice of Adverse Action, terminating Employee. On August 26, 2019, the AJ issued an Initial Decision. She held that the D.C. Court of Appeal's ruling in *Pinkard* limited OEA to determining whether Agency's decision was based on substantial evidence; whether Agency committed a harmful procedural error; and whether Agency's adverse action was taken in accordance with all applicable laws, rules, and regulations. Concerning the substantial evidence requirement, the AJ concluded that Agency met its burden of proof in establishing that each charge and specification against Employee was supported by the record. Regarding whether Agency committed a harmful procedural error, the AJ highlighted D.C. Code § 5-1031, which requires that disciplinary actions be commenced within ninety days of when an agency or personnel authority knew or should have known of the misconduct allegedly constituting cause. The AJ agreed with Employee's argument that Agency violated the 90-

day rule with respect to Charge No. 1 because the Notice of Proposed Adverse Action for the Inefficiency charge was served in an untimely manner.

As it related to the Refusal to Submit and Failure to Obey Orders, the AJ concluded that both charges were supported by substantial evidence. She reasoned that based on the Panel's hearing transcript and the documents of record, it was uncontroverted that Employee left the PFC on May 11, 2017 without submitting to a BAT as directed by Dr. Kenel. Lastly, regarding whether the penalty of termination was appropriate under the circumstances, the AJ held that, notwithstanding Agency's violation of the 90-day rule for the Inefficiency charge, termination was a permissible penalty with respect to the Refusal to Submit and Failure to Obey Orders charges.

Employee disagreed with the Initial Decision and filed a Brief in Further Support of Petition for Review with the OEA Board on June 19, 2020. He argues that the Initial Decision was based on erroneous interpretation of regulation, policy, and law; the AJ failed to properly address all issues of fact and law raised on appeal; the AJ's findings were not based on substantial evidence; and that the penalty of termination was unreasonable. He contends that the Initial Decision fails to discuss how the penalty of termination was reasonable and states that the AJ neither identified nor discussed the relevant *Douglas* factors relied upon by Agency in reaching its decision to terminate him. Therefore, Employee requests that the Board grant his Petition for Review.

In response, Agency maintains that each of the charges against Employee is supported by substantial evidence. It disagrees with Employee's argument that he did not refuse to submit to the BAT on May 11, 2017. According to Agency, his conduct at the PFC constituted a violation of General Order 120.21, A-23. It reiterates that the AJ properly upheld the penalty because the Panel provided an appropriate analysis of the *Douglas* factors and because termination was within the range of allowable penalties. Thus, it requests that Employee's Petition for Review be denied.

C. Deliberations – This portion of the meeting will be closed to the public for deliberations in accordance with D.C. Official Code § 2-575(b)(13).

D. Open Portion Resumes

E. Final Votes on Cases

F. Public Comments

VI. Adjournment