

Agenda

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

Tuesday, June 21, 2016 at 11:00 a.m.

Location: 1100 4th Street, SW, Suite 380E

Washington, DC 20024

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 Motion to Expedite

B. Summary of Case

1. Sholanda Miller v. Metropolitan Police Department, OEA Matter No. 1601-0325-10R15 – Employee requests that her Petition for Review on Remand be expedited given the length of time that her case has been on appeal before OEA.

C. Public Comments on Petitions for Review

D. Summary of Cases

1. Devarnita Williams v. D.C. Public Schools, OEA Matter No. 1601-0171-13 – Employee worked as a Teacher with Agency. On July 29, 2013, Employee received a notice from Agency that she would be terminated from her position for discourteous treatment of the public, supervisor, or other employees. Employee filed a Petition for Appeal with OEA on September 30, 2013. She argued that Agency relied on hearsay to remove her, and it failed to conduct a complete investigation. Therefore, she requested that she be reinstated to her position and made whole.

Before issuing her Initial Decision, the OEA Administrative Judge (“AJ”) ordered both parties to submit Pre-hearing Statements. Employee asserted that Agency violated Article 7 of the Collective Bargaining Agreement (“CBA”) between Agency and the Washington Teacher’s Union (“WTU”). She argued that Agency failed to provide her with an advance written notice ten days prior to the effective date of discipline. Additionally, Employee claimed that Agency did not provide a written complaint of the allegations within seventy-two hours of the incident or offer her an opportunity to respond. Moreover, in accordance with the CBA, it was Employee’s position that Agency did not take disciplinary action within thirty days of her supervisor becoming aware of the alleged infraction. Finally, Employee explained that Agency did not consider both aggravating and mitigating circumstances when deciding the penalty imposed against her.

Agency’s Pre-hearing Statement provided that it determined that Employee violated 5-E D.C. Municipal Regulations (“DCMR”) § 1401.2(n). In a subsequent filing, Agency further explained that it provided adequate notice to Employee in accordance with 5-E DCMR §§ 1401.3 and 1401.4. As for Employee’s argument regarding disciplinary action being taken within thirty days, Agency asserted that although this language is within the CBA, it and the WTU had a long-held practice and mutual agreement to waive the thirty-day requirement.

The AJ issued her Initial Decision on February 6, 2015. She held that both parties agreed that Agency failed to comply with the thirty-day deadline when removing Employee; Agency took approximately ninety days to initiate disciplinary action against Employee. The AJ noted that the intent of mandatory language like that provided in the CBA, is to alleviate the prolonged uncertainty that Employee may have regarding disciplinary action.

The AJ also ruled that Agency failed to comply with the notice requirements provided in 5-E DCMR §§ 1401.3 and 1401.4. She reasoned that the grounds for removal provided in Employee's notice was not sufficiently detailed to reasonably inform Employee of the specific grounds of the cause taken against her. The AJ found that Agency's notice failed to provide the date of the alleged incident or the names of the witnesses who lodged the complaint. Consequently, she reversed Agency's action against Employee and ordered that Agency reinstate Employee to her position with back pay and benefits.

On March 13, 2015, Agency filed a Petition for Review with the OEA Board. It contends that the AJ failed to consider the past practices regarding the time limit waiver that existed between it and the WTU. Agency claims that the AJ failed to consider the affidavit provided by Erin Pitts, as well as the arbitration decisions it submitted. It also asserts that the AJ ignored that it provided Employee with notice and an opportunity to be heard. Agency opines that the notice sufficiently explained the charges against Employee. However, if the notice did not offer an adequate description of the charges, then the notice could have been read in conjunction with other documents provided to amount to sufficient notice. Therefore, it requested that this Board reverse the Initial Decision and remand the case to the AJ for an evidentiary hearing.

Employee filed her response to Employee's Petition for Review on April 20, 2015. She posits that the AJ properly considered and interpreted the terms outlined in the CBA. Additionally, Employee explains that the AJ correctly held that Agency failed to provide adequate notice of the charges taken against her, as provided in the DCMR and CBA. Employee contends that Agency's inadequate notice deprived her of her due process rights. She argues that in addition to not complying with the thirty-day deadline, Agency also failed to provide her with the investigation report, as provided in the CBA. Employee alleges that she was not provided with the investigation report until after she was terminated from her position. Finally, she asserts that Agency introduced grievance decisions on Petition for Review that were not presented to the AJ. Thus, she requested that Agency's petition be denied.

2. Valerie Sanders v. Department of Transportation, OEA Matter No. 1601-0226-12 – Employee worked as a Traffic Control Officer with Agency. Agency removed her for “any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law: assault, battery, or fighting on duty, pursuant to DPM § 1603.3(e) and § 1619.1(5)(c)” and “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: use of abusive or offensive language, pursuant to DPM § 1603.3(g) and § 1619.1(7).” Specifically, Employee was charged with physically pushing a citizen who questioned why she was issuing a parking ticket to him; using profanity and raising her middle finger to a school bus driver; and using profanity with her supervisor when presented with the notice placing her on administrative leave.

Employee filed a Petition for Appeal with OEA on August 29, 2012. She denied committing the alleged infractions. As a result, she requested that she be reinstated to her position.

On October 5, 2012, Agency filed its Answer to Employee's Petition for Appeal. It explained that it had cause to remove Employee from her position. Agency contended that Employee admitted to her supervisor that she assaulted or threatened another person in a menacing manner, which is a criminal offense in the District of Columbia. Agency claimed that the facts

supported that Employee was the aggressor; however, even if she was not, it is undisputed that she used profanity and pushed the citizen, Mr. Aberra. Additionally, Agency stated that Employee voiced obscenities and made obscene gestures to a school bus driver, Ms. Meade. She also cursed at her supervisor during a meeting. Agency further asserted that it considered all of the relevant *Douglas* factors and the range of penalties related to Employee's conduct. Therefore, it requested that Employee's removal be sustained.

The AJ conducted an evidentiary hearing before issuing her Initial Decision on January 30, 2015. After reviewing the documents submitted by both parties and the testimonies provided, the AJ held that there was evidence to sustain the charge of "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law: assault, battery, or fighting on duty." The AJ found that Employee's testimony conflicted with the affidavit statements of the other witnesses. Accordingly, she held that Employee initiated the physical altercation with Mr. Aberra. Because pushing Mr. Aberra caused offensive bodily contact, she ruled that there was cause for the charge.

The AJ also found that Employee used offensive language toward her supervisor. As a result, the AJ ruled that Agency also had cause for "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: use of abusive or offensive language." However, there was not enough evidence to support Agency's determination that Employee used profanity and raised her middle finger toward Ms. Meade.

As it relates to the *Douglas* factors and range of penalties, the AJ concluded that relevant factors were considered by the Agency. She also opined that Agency acted reasonably when determining the penalty for Employee's actions. Therefore, she upheld its termination action against Employee.

Employee filed a Petition for Review with the OEA Board on March 9, 2015. She contends that the Initial Decision was not based on substantial evidence. She argues that the AJ relied on hearsay that was unreliable and faulted her for offering a more detailed account of the incident during the evidentiary hearing. Employee explains that there were no contradictions between her written response and her testimony. She further posits that because Mr. Aberra and Renee Snowden did not testify, it was hearsay to allow the testimony of others who were not present during both incidents.

Furthermore, Employee alleges that the AJ ignored evidence that the proposed removal was not issued by an authorized official, as required by the DPM. She also claims that the AJ failed to consider that Agency did not prove that relevant *Douglas* factors were considered. Thus, Employee requests that she be reinstated to her position with back pay and benefits.

On April 13, 2015, Agency filed a response to Employee's Petition for Review. It contends that Employee offered no support for her argument regarding the proposed removal being decided by an authorized official. It went on to highlight all the references it made in the record to its consideration of the *Douglas* factors.

As for Employee's argument regarding hearsay, Agency provides that in accordance with OEA Rule 626.1, the AJ could rely on all material and relevant evidence or testimony in an evidentiary hearing. It noted that OEA Rule 626.2 provides that an agency is entitled to present its case by oral or documentary evidence. Thus, it is Agency's position that it had cause to remove Employee given the testimony and documents submitted. As a result, it requests that Employee's removal be sustained.

3. Donna Pixley v. D.C. Public Schools, OEA Matter No. J-0015-15 – Employee worked as a Registrar with Agency. She was removed from her position for "other conduct during and

outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." Specifically, she was terminated for engaging in a verbal disagreement, which led to a physical altercation, with another Agency employee while at a school football game.

Employee filed a Petition for Appeal with OEA on January 13, 2014. She argued that the termination action was not justified. Therefore, she requested that she be reinstated to her position with retroactive pay.

The AJ issued an order to Employee requesting a legal brief on whether her appeal should be dismissed due to her untimely filed Petition for Appeal. Employee had until December 5, 2014, to file her brief. However, no brief was submitted.

Accordingly, the AJ issued her Initial Decision on December 10, 2014. She held that Employee had thirty days from the effective date of the termination action to appeal her termination. The effective date of her termination was September 5, 2014. However, Employee did not file her appeal until November 13, 2014, which was beyond the thirty-day deadline. Therefore, the AJ dismissed her appeal for lack of jurisdiction.

Employee filed a Petition for Review with the OEA Board on January 14, 2015. She asserts that she was a member of the American Federation of State, County, and Municipal Employees ("AFSCME") Local 2921. As a result, under the terms of her CBA, a formal hearing could have been held to potentially modify her termination action. Because she was confident that her termination would be overturned, Employee explained that she "elected to wait" until she received a response from Agency.

Agency filed a response to Employee's Petition for Review on April 14, 2015. It argues that the AJ's decision was based on substantial evidence. Agency contends that Employee's petition was untimely filed. Therefore, OEA lacked jurisdiction over her case. Accordingly, it requests that Employee's Petition for Review be dismissed.

4. Justin Scales v. D.C. Fire and Emergency Medical Services, OEA Matter No. 1601-0016-15 – Employee worked as a Firefighter/EMT with Agency. Agency terminated Employee from his position for failing to adhere to the D.C. Fire and EMS Order Book, Article XI, Part II, Section 1.1/b. This section requires all firefighters who wish to be placed on sick leave to report to the Police and Fire Clinic ("PFC") between 7:00 and 8:30 a.m. Additionally, Employee was charged with unauthorized absences of ten days or more, a violation of D.C. Fire and EMS Order Book Article VII, Section 2(f)(1). Specifically, Agency asserted that Employee failed to report for duty for eleven consecutive tours of duty. The effective date of Employee's removal was October 11, 2014.

On November 14, 2014, Employee filed a Petition for Appeal with OEA. He argued that he followed the procedure to report sick leave, but he was denied entry to the PFC. Employee contended that he was only absent without leave ("AWOL") for two tours of duty. Therefore, he filed an appeal with OEA to ensure fairness.

Agency filed a Motion to Dismiss Employee's appeal because it was untimely filed. Agency stated that in accordance with D.C. Official Code § 1-606.03(a) and DCMR § 604.2, Employee's appeal should have been filed by November 10, 2014. However, the appeal was not filed until November 14, 2014. Therefore, Agency requested that Employee's appeal be dismissed.

On December 5, 2014, the AJ asked the parties to file briefs on whether Employee's appeal should be dismissed due to his untimely filing. In Employee's brief, he explained that he

learned of his termination on October 12, 2014. However, he did not receive official notice of the termination action until October 15, 2014. Therefore, he believed his appeal was filed in a timely manner.

Agency posited that by Employee's own admission, he was aware of his termination and received notice on October 15, 2014. Thus according to Agency, Employee was fully aware that his effective date of termination was October 11, 2014, and he had thirty days from that date to file an appeal with OEA. However, Employee elected to wait until beyond the thirty-day period to file his appeal. Consequently, it argued that OEA lacks jurisdiction to consider the merits of his case. Therefore, Agency, again, requested that the appeal be dismissed.

The AJ issued her Initial Decision on January 20, 2015. She held that the time limit for filing an appeal with an administrative adjudicatory agency is mandatory and jurisdictional in nature. The AJ ruled that Agency gave Employee proper notice of his termination and appeal rights to OEA. However, he did not file his petition until more than thirty days after the jurisdictional deadline. Accordingly, the AJ reasoned that OEA lacked jurisdiction to consider the merits of Employee's appeal and dismissed the case.

On February 25, 2015, Employee filed a Petition for Review with the OEA Board. He states that “. . . the effective date of my termination was October 11, 2014. The Agency's final decision stated I had the right to appeal my termination to the [O]ffice of [E]mployee [A]ppeals within 30 days of the effective date of termination. This is not up for dispute.” However, he claims that Agency failed to provide him with adequate notice of its final decision. Employee asserts that Agency should have provided his notice of removal within three days in accordance with District Personnel Regulation (“DPR”) § 1614.4. He explains that he was informed that he was terminated on October 12, 2014, when he reported to duty, but he did not receive a copy of Agency's final decision until October 15, 2014. Therefore, he requests that the Board reverse the Initial Decision.

Agency filed its response to Employee's Petition for Review on March 18, 2015. It argues that similarly to his untimely filed Petition for Appeal, Employee's Petition for Review was also untimely filed. Agency opines that in accordance with D.C. Official Code § 1-606.03(c), the AJ's Initial Decision became final on February 24, 2015. Therefore, Employee's petition was untimely. Agency contends that the Board does not have the authority to waive the filing requirement. Hence, it requests that Employee's Petition for Review be dismissed.

5. Anitha Davis v. D.C. Public Schools, OEA Matter No. 2401-0162-13 - Employee worked as an Administrative Aide with Agency. On May 24, 2013, Agency notified Employee that she was being separated from her position pursuant to a Reduction-in-Force (“RIF”). The effective date of her termination was August 16, 2013.

Employee filed a Petition for Appeal with OEA on September 13, 2013. In her appeal, Employee argued that Agency violated RIF procedures by failing to afford her one round of lateral competition. She also contended that Agency did not provide her with information pertinent to the RIF and her appeal rights. According to Employee, Agency also erred in not allowing her to exercise her seniority or retreat rights, in violation of the DCMR. Employee, therefore, requested to be reinstated to her former position or any other position for which she was qualified.

Agency filed its Answer to the Petition for Appeal on October 16, 2013. It contended that the RIF was conducted in accordance with Title 5, Chapter 15 of the DCMR and that Employee was provided with the required thirty days' notice prior to the effective date of her termination. Agency stated that the RIF was implemented as a result of reorganization, curtailment of work,

and budgetary restraints. Employee's school, M.C. Terrell, was permanently closed, and she was temporarily assigned to Aiton Elementary School from June 20, 2013 through August 16, 2013, pending the effective date of the RIF. According to Agency, Employee was not entitled to one round of lateral competition because she was the sole Administrative Aide at M.C. Terrell, and the entire competitive level in which she worked was eliminated. It, therefore, asked that OEA uphold Employee's separation under the RIF.

An AJ was assigned to this matter on May 14, 2014. On May 30, 2014, the AJ ordered the parties to submit written briefs addressing whether Agency's RIF action should be upheld. Both parties complied with the order. The AJ issued his Initial Decision on December 30, 2014, holding that Employee was RIF'd in accordance with all applicable laws, rules, and regulations. Specifically, he stated that the entire competitive level in which Employee competed was eliminated; thus, Agency was not required to afford Employee one round of lateral competition under D.C. Official Code § 1-624.08(e). In addition, the AJ determined that Agency provided Employee with thirty days' written notice prior to the effective date of her termination. He also noted that Employee was detailed to Aiton Elementary School from June 25, 2013, until the effective date of her termination under the RIF. However, he determined that Employee's detail had no bearing on the legality of the RIF action. Consequently, Employee's separation from service was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 4, 2015. She argues that the AJ's findings were not based on substantial evidence and that the decision did not address all material issues of fact and law that were raised during the course of her appeal. According to Employee, Agency was ordered by the AJ to provide her with a copy of her personnel file so that she could submit a more thorough and complete brief to support her position that the RIF action was flawed. Employee believes that she was officially transferred to a vacant position at Aiton Elementary School. Therefore, Agency should have allowed her to compete for retention at this school based on her Service Competition Date, performance rating, and District of Columbia residency preference. She further contends that Agency submitted a response to the AJ's Briefing Order in an untimely manner, which denied her the opportunity to respond to its rebuttal brief.

Moreover, Employee contends that the AJ erred by failing to address her claims that Agency violated certain sections of the CBA between DCPS and the American Federation of State, County, and Municipal Employees ("AMSCME"). She claims that the AJ should have held an evidentiary hearing for the purpose of adducing evidence to support the conclusion that the RIF action was implemented at the same time Agency was recruiting for and fulfilling the same or similar vacant positions. Employee, therefore, asks this Board to reverse the Initial Decision and find that Agency's RIF action was improper. Agency filed its response to the Petition for Review on March 9, 2016, for the purpose of clarifying that it did comply with the AJ's order to submit a legal brief on or before July 2, 2014.

6. Grover Massenburg v. D.C. Public Schools, OEA Matter No. 1601-0004-13 – Employee worked as a Teacher at Wilson High School. On August 21, 2012, Agency notified Employee that he was being terminated based on a charge of "willful nonperformance/inexcusable neglect of duty, in accordance with Chapter 5E, Section 1401.2(d) of the DCMR. Specifically, Agency alleged that he failed to report a conversation on May 30, 2012, wherein a student discussed with Employee his desire to harm himself and displayed a handgun. The effective date of Employee's termination was September 6, 2012.

Employee filed a Petition for Appeal with OEA on October 2, 2012. In his appeal, he argued that Agency failed to indicate, with specificity, which policy or rule that was violated by failing to confiscate the handgun from the student. Employee contended that Agency did not provide

evidence to support its claim that his conduct warranted a charge of inexcusable neglect of duty of willful nonperformance. Employee claimed that he initially believed that the weapon was a toy and that a real handgun should have been detected by the metal detectors. Additionally, Employee stated that he fully intended to report the incident after realizing the severity of the situation. He also argued that Agency committed a procedural error by failing to provide him with a written or verbal reprimand prior to removing him. Finally, he asserted that he was not placed on administrative leave pending an investigation into the incident. Employee, therefore, requested that he be reinstated with back pay and benefits.

Agency filed its Answer to the Petition for Appeal on November 5, 2012. It argued that all school-based employees received training with respect to emergency procedures and that all classrooms are equipped with the "District of Columbia School Emergency Procedures Guide." According to Agency, the D.C. Public Schools' Office of School Security ("OSS") investigated the matter and determined that Employee admitted to knowing that a student possessed a handgun on school property. Moreover, it argued that Employee's actions and/or inaction caused a potentially dangerous situation. Agency conceded that Employee was not placed on administrative leave at the time of the incident and did not receive a verbal or written reprimand. However, it submitted that it exercised the proper managerial discretion in terminating Employee based on the seriousness of the offense.

An AJ was assigned to this matter on January 21, 2014. On January 24, 2014, the AJ issued an order convening a prehearing conference for the purpose of assessing the parties' arguments. During the conference, Employee argued that Agency committed several procedural errors in conducting its termination action. The parties were subsequently ordered to submit written briefs addressing whether Agency terminated Employee in accordance with all applicable statutes, laws, and regulations.

In his brief, Employee asserted that Agency violated Article 7.8.3 of the CBA between Agency and the WTU because it failed to initiate the adverse action against within thirty days after his supervisor became aware of the incident. Employee also submitted that Agency violated 7.8.2 of the CBA. This provision provides that employees and/or their union representatives have the right to review all documents related to the charges against them within five days of the receipt of the notice. In its brief, Agency explained that it had a long history of receiving consent from the WTU to extend the time from for conducting investigations. Therefore, Agency posited that it did not violate Article 7.8.3.

The AJ issued his Initial Decision on February 10, 2015. He first determined that OEA was not jurisdictionally barred from considering Employee's claim that his termination violated the express terms of the CBA. In determining whether Agency violated the CBA, the AJ cited to Article 7.8.3, which provides that "initiation of the disciplinary action shall be taken no later than thirty (30) school days after the Supervisor's knowledge of the alleged infraction...This time limit may be extended by mutual consent, but if not so extended, must be strictly adhered to." Based on a review of the record, he concluded that Agency failed to initiate the instant adverse action within thirty days of Employee's supervisor becoming aware of the alleged infraction. He further held that there was no credible evidence in the record to support the assertion that Agency and the WTU have mutually agreed to not follow the terms of Article 7.8.3. The AJ noted that Employee and his union representative did not expressly agree to waive the time limit requirement for the purpose of allowing additional time to investigate the incident. Lastly, he found that Agency violated Article 7.8.2 of the CBA, which gave Employee and/or the WTU with the "right to review all documents related to the charges, meet with representatives from the Office of the Chancellor before implementation of the proposed...discharge, and to provide a written reply..." Accordingly, the AJ reversed Agency's removal action and reinstated Employee with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review with this Board. It argues that the AJ failed to contribute greater weight to the facts most favorable to Agency, the non-moving party. It further asserts that he failed to consider past practice and customs between the WTU and Agency regarding waving the time limit requirement found in Article 7.8.3 of the CBA. In support thereof, Agency cites to the affidavit of Erin Pitts, who serves as the Director of DCPS' Labor Management and Employee Relations division. In addition, Agency believes that the AJ's conclusion that it violated Article 7.8.2 of the CBA is not based on substantial evidence. In the alternative, it asserts that even if Employee was not provided with the proper advance notice the adverse action, he did not prove that he was prejudiced in prosecuting his case before OEA. Therefore, it requests that this Board reverse the Initial Decision and remand the case to the AJ for an evidentiary hearing.

Employee filed a Response to Agency's Petition for Review on April 20, 2014. He argues that Agency's Petition for Review should be denied because, if the Initial Decision were reversed, there would be nothing to prevent it from taking an indefinite amount of time to complete internal investigative and disciplinary actions against employees. He also submits that the AJ was correct in concluding that Agency failed to comply with the requirements of Article 7.8.2 of the CBA. Of note, Employee reiterates that Agency failed to respond to his argument in any pleadings before the OEA; therefore, resulting in a waiver and admission that it failed to comply with the requirement of Article 7.8.2. Employee, therefore, asks this Board to not consider any arguments that Agency has raised for the first time on appeal. Accordingly, he asks that the Initial Decision be upheld and that Agency's Petition for Review be denied.

7. Dwayne Redmond v. Department of General Services, OEA Matter No. 2401-0020-12R14 – Employee worked as a Protective Services Officer with Agency. On July 18, 2012, Agency issued a final decision suspending Employee for ten business days, with five days held in abeyance. Employee was charged with “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.” Specifically, he was suspended for neglect of duty, insubordination, misfeasance (providing inaccurate and misleading information), and unreasonable failure to assist a fellow government employee in carrying out assigned duties. The facts which formed the basis of this appeal stemmed from an incident on November 23, 2011, wherein Employee allegedly disregarded a direct order to respond to a Priority 1 radio call; failed to promptly respond or arrive for an assignment at Wilson High School, located at 3950 Chesapeake Street, NW; and refused to assist a fellow employee by not providing back up to security officers on the scene.

Employee filed a Petition for Appeal with the OEA on August 15, 2012, arguing that he was wrongfully suspended. Agency filed its answer to Employee's appeal on September 19, 2012, asserting that Employee was suspended in accordance with the DPM. In addition, Agency stated that it properly considered the factors outlined in *Douglas*.

An AJ was assigned to this matter in November of 2013. On February 5, 2014, the AJ issued an Initial Decision dismissing Employee's Petition for Appeal based on his failure to appear at a scheduled Status Conference and his subsequent failure to respond to her Order for Statement of Good Cause. Both orders were returned to sender as undeliverable. His appeal was, therefore, dismissed for failure to prosecute.

On June 9, 2014, Employee filed a Motion to Reinstate Petition for Appeal. He argued that his appeal included a signed Designation of Employee Representative Form and that his attorney was never served with the Status Conference order or the Order for Statement of Good Cause. On July 24, 2014, OEA's Board issued an Opinion and Order on Petition for Review. The Board granted Employee's petition in the interest of justice and remanded it to the AJ to consider the merits of the case.

A Status/Prehearing Conference was held on October 8, 2014. On October 20, 2014, the parties were ordered to submit written legal briefs that addressed whether Employee was suspended for cause and whether the penalty was appropriate under the circumstances.

On December 23, 2014, the AJ issued an Initial Decision on Remand. She held that Agency established that it had cause to suspend Employee based on the charges of insubordination and misfeasance. She also determined that there was cause to support the charge of unreasonable failure to assist a fellow government employee in carrying out assigned duties, as well as unreasonable failure to give assistance to the public. Lastly, the AJ found that a suspension of ten days, with five days held in abeyance, was an appropriate penalty under the circumstances.

Employee subsequently filed a second Petition for Review with OEA's Board on January 26, 2015. He argues that the Initial Decision is based on an erroneous interpretation of statute and that the AJ did not address all of the issues of law and fact. Employee also argues that that AJ's decision is not supported by substantial evidence. He, therefore, asks this Board to reverse the Initial Decision and reinstate him with back pay and benefits.

Agency filed its Answer to the Petition for Review on March 2, 2015. It contends that each of the charges was supported by substantial evidence in the record. According to Agency, Employee was disciplined for disobeying a lawful order by his supervisor. In addition, it asserts that Employee possessed the legal authority to take police action as directed. In addition, Agency states that Employee was, in fact, authorized to carry his service weapon at all times while on duty. Agency believes that a ten day suspension, with five days held in abeyance was the appropriate penalty and requests that the OEA's Board to uphold the Initial Decision.

8. Robin Halprin v. Department of Health, OEA Matter No. 1601-0107-08 – Employee worked as a Psychologist with the Department of Mental Health (“Agency”) at Saint Elizabeths hospital. On June 13, 2008, Agency issued a written notice to Employee informing her that she was being terminated for “Incompetence (Medical): Inability to satisfactorily perform one or more major duties of your position...due to medical incapacitation.” The effective date of her termination was June 20, 2008.

Employee filed a Petition for Appeal with the OEA on July 14, 2008. In her appeal, Employee argued that Agency failed to provide her with an advance written notice of her proposed removal. Employee explained that she was out of work as a result of an injury she sustained while on duty. Employee asked that she be reinstated with back pay and benefits.

Agency filed its answer to the Petition for Appeal on August 15, 2008. It argued that Employee was terminated for cause because she was still unable to satisfactorily perform one or more major duties of her position at the time she was terminated. Agency stated that it complied with Chapter 6, Section 827.3 of the DPM, which requires an agency to carry an eligible employee on leave without pay for two (2) years from the date of commencement of compensation. It further stated that DPM § 827.5 required that Employee be terminated at the end of the two-year period. According to Agency, Employee was on medical leave for approximately four years; thus, her termination was lawful because it complied with all relevant rules, laws, and regulations.

This matter was assigned to an AJ for adjudication on October 7, 2008. On October 14, 2008, AJ Quander issued an order convening a Prehearing Conference for the purpose of assessing the parties' arguments. The Prehearing Conference was rescheduled on November 3, 2008. The parties engaged in unsuccessful settlement talks from 2008 through 2012. On January 9, 2013, the matter was reassigned to AJ Hochhauser after AJ Quander left OEA's employ. In April of 2013, the case was again reassigned to AJ Robinson. The parties subsequently engaged in a second and third round of mediation in August of 2013 and June of 2014,

respectively. The parties were unable to reach a settlement agreement and were ordered to submit legal briefs addressing whether Employee was terminated for cause.

An Initial Decision was issued on February 23, 2015. The AJ held that Employee received Agency's Final Notice of Termination and that any procedural error that Agency may have committed in providing advance notice was harmless. In addition, the AJ determined that Agency complied with D.C. Official Code § 1-623.45 because Employee was receiving disability compensation benefits for four years before Agency initiated her removal action. As discussed infra, the AJ further noted that D.C. Official Code § 1-623.45(b) was amended in both 2001 and 2005 regarding the time period within which an employee must overcome his or her disability to invoke their retention rights. However, he held that Employee was not entitled to invoke D.C. Official Code § 1-623.45(b)(2001) or § 1-623.45(b)(2005) because it was uncontroverted that she was still unable to perform the essential duties of her job as a psychologist at the time she was terminated. The AJ, therefore, held that Agency's removal action should be upheld.

Employee subsequently filed a Petition for Review with OEA's Board on March 17, 2015. In her petition, Employee argues that the AJ committed reversible error in concluding that Agency's failure to provide her with advance notice of her termination was harmless. She also asserts that Agency's decision that she was incapable of performing the functions of her job was not supported by substantial evidence. Employee states that the AJ failed to consider her argument that Agency refused, without good cause, to allow her to continue to work as other psychologists worked, then proceeded to contrive and "manipulate grounds to terminate her..." Lastly, she submits that the AJ erred in holding that termination was within the range of penalties allowed by laws, rules, or regulation. Employee, therefore, asks this Board to reverse the Initial Decision and determine whether she received Agency's Advanced Notice of Termination, and whether she was actually competent to perform the duties of her position.

Agency filed a Reply to Employee's Petition for Review on April 15, 2015. It argues that the AJ's findings are supported by substantial evidence in the record and asks the Board to uphold the Initial Decision. Agency states that Employee's allegation that she failed to receive its Advance Notice of Termination would not have altered its final decision to terminate her and that Employee was not substantially prejudiced by the alleged error. Moreover, Agency believes that the AJ Robinson correctly concluded that it acted with the proper managerial discretion in choosing the penalty of termination. Employee subsequently filed a Reply to Agency's Opposition to Petition for Review on April 27, 2015, reiterating her previous arguments as presented in her appeal to this Board.

- E. 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).
- F. Open Portion Resumes**
- G. Final Votes on Cases**
- H. Public Comments**

VI. Adjournment