

Agenda

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

Tuesday, September 13, 2016 at 11:00 a.m.

Location: 1100 4th Street, SW, Suite 620 (East Building)

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 Petitions for Review

B. Summary of Cases

1. Barry Baxton v. Department of Public Works, OEA Matter No. 1601-0012-12 – Employee worked as a Motor Vehicle Operator with Agency. On September 30, 2011, Agency issued a final notice of removal to Employee. The causes of action alleged were “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include neglect of duty, failure to carry out assigned tasks; careless or negligent work habits” and “any other on-duty or employment-related reason for corrective or adverse action: may include any activities for which the investigation can sustain that it is not ‘de minimis’ (i.e., very small or trifling matters).” Specifically, Agency argued that Employee engaged in sexual activity in a public area during his tour of duty.

The OEA Administrative Judge (“AJ”) ruled that Agency had cause for both charges. He held that both actions of receiving oral sex or urinating into a cup amounted to negligence or carelessness while Employee was on duty. The AJ found the testimony provided by Ms. Roch to be credible. Moreover, he found that Agency’s witnesses, Mr. Howland and Mr. Carter, offered credible testimonies regarding Agency’s bathroom policy for employees working on public streets. Consequently, he concluded that Employee was engaged in oral sex in a public place during work hours.

Additionally, the AJ ruled that despite having an alleged medical condition which resulted in frequently urination, Employee neglected to inform Agency so that it could accommodate his condition. He found that urinating in the stairwell, to which Employee admitted, was enough to prove the charge of “any other on-duty or employment-related reason for corrective or adverse action: may include any activities for which the investigation can sustain that it is not de minimis.” The AJ held that Agency adequately proved the charge. The AJ opined that in accordance with the Table of Penalties, removal was an appropriate penalty for the charges. Accordingly, Agency’s removal action was upheld.

On March 25, 2015, Employee filed a Petition for Review with the OEA Board. He asserts that the AJ failed to consider his health issues when issuing the Initial Decision. Employee also contends that Ms. Roch did not offer truthful testimony during the evidentiary hearing and that Ms. Roch harassed Ms. Bushby after the incident to force her to move. Therefore, he requests that the Board reconsider his case.

Agency filed a Response to Employee's Petition for Review and provides that the AJ addressed Employee's medical condition and the nature of the relationship between Ms. Bushby and Ms. Roch. It opines that removal was within the range of penalty for the first offense of a neglect of duty charge. Therefore, it requests that Employee's petition be denied.

2. Patricia Volcy v. Office of State Superintendent of Education, OEA Matter No. 1601-0111-14 –Employee worked as a Bus Attendant with Agency. Agency terminated Employee from her position for physically assaulting a student. Her termination was effective on January 2, 2008.

The AJ issued her Initial Decision on February 24, 2015. She provided that prior to the current appeal, Employee filed an appeal with OEA on April 2, 2008. However, she withdrew her appeal on April 17, 2008, and elected to appeal her claim through her union. Thereafter, an Initial Decision was issued dismissing the appeal, as Employee requested.

The AJ held that after a review of the prior appeal, it was clear that Employee withdrew her appeal. Furthermore, Employee does not dispute this claim. Thus, she ruled that Employee was attempting to have “a second bite at the appeal” by filing the current matter. The AJ explained that Employee cannot re-litigate this matter because she was not previously successful in her appeal before the union. Moreover, she found that because Employee chose to appeal her termination through her union, she could not then appeal to OEA. As a result, the AJ dismissed Employee's case.

Employee filed a Petition for Review with the OEA Board on March 30, 2015. She admits that she filed a withdrawal of her appeal with OEA so that she could appeal to her union. However, she refiled an appeal with OEA because she did not hear anything from her union from May of 2008 through August 15, 2014. Employee requests that this Board grant her petition because despite numerous attempts to reach the union, she has been unsuccessful. She claims that but for the union's statement that it would handle her appeal, she would have allowed her first appeal with OEA to continue. Therefore, she requests that she be given the opportunity to challenge the termination action against her.

3. Lynette Holcomb v. Office of State Superintendent of Education, OEA Matter No. 1601-0068-14 – Employee worked as a Bus Attendant with the Office of State Superintendent of Education (“Agency”). On March 6, 2014, Agency terminated Employee for “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Specifically–unauthorized absence of ten (10) consecutive days or more constitutes abandonment.” The effective date of Employee's removal was March 6, 2014.

The AJ issued her Initial Decision on February 27, 2015. She found that in matters involving absence without leave (“AWOL”), the D.C. Court of Appeals ruled in *Murchison v. D.C. Department of Public Works*, 813 A.2d 203 (D.C. 2002) that an employee must be incapacitated and unable to work for it to be a legitimate excuse for AWOL. She found that the medical documentation provided by Employee did not corroborate that she was incapacitated due to illness during the absence period. Moreover, the AJ held that Employee did not request leave for the period that she was AWOL. Accordingly, she ruled that Employee's absence was not excusable. Additionally, the AJ found that removal was within the range of penalty for the first offense of AWOL. Therefore, she upheld Agency's removal action.

Employee filed a Petition for Review with the OEA Board on April 2, 2015. She asserts that she was absent once a week due to relocating after her mother's passing. Employee concedes

that she was informed of the penalty she would face if she continued to be absent from work. However, she contends that things got out of hand as a result of her mother's death. Employee provides that she was a good employee who did not deserve the harsh penalty of removal as a result of her absence.

4. Brandon Dickens v. Office of State Superintendent of Education, OEA Matter No. 1601-0020-15 – Employee worked as a Motor Vehicle Operator with the Office of the State Superintendent of Education (“Agency”). On November 12, 2014, Agency issued a final notice demoting him from a Motor Vehicle Operator to a Bus Attendant. The notice provided that he was being reduced in grade and salary based on his refusal to submit to a “Fit for Duty” assessment. The effective date of the demotion was November 30, 2014.

An AJ was assigned to this case on February 23, 2015. On March 3, 2015, the AJ ordered Employee to submit a notice of withdrawal to this Office because the matter was settled during a mediation conference. He did not reply to the order. The AJ subsequently issued an Initial Decision on April 14, 2015. She held that Employee failed to submit a notice of withdrawal by the required deadline, thereby violating her March 3, 2015, order. She, therefore, dismissed his Petition for Appeal for failure to prosecute.

Employee subsequently filed a Petition for Review with the OEA Board on April 28, 2015. He argues that he has consistently complied with each of OEA's request to submit documentation and states that his failure to respond to the AJ's order was merely a harmless error. Employee states that he has been diligent in prosecuting his appeal before this Office and apologizes for his failure to submit a written notice of withdrawal.

5. Catherine Duvic v. Department of Behavioral Health, OEA Matter No. J-0012-15 - Employee worked as a Psychiatric Nurse at Saint Elizabeths Hospital (“Agency”) from 2011 until 2014. On February 9, 2014, Employee was involved in an incident wherein she failed to adhere to the hospital's procedure. Her failure to comply with Agency's policy resulted in a patient escaping from the hospital. On February 14, 2014, the patient was found deceased, approximately two miles away from Saint Elizabeths. As a result, Employee was charged with neglect of duty and suspended for three days without pay.

On August 30, 2014, Employee was suspended for fifteen days after she was observed sleeping while on duty. Agency subsequently placed her on a Performance Improvement Plan (“PIP”) from August 5, 2014 through August 26, 2014. On September 16, 2014, Employee submitted a letter of resignation. She requested that her resignation become effective on October 4, 2014. The letter was accepted in writing by St. Elizabeths' Chief Nursing Executive, Dr. Vidoni-Clark. Employee was placed on paid administrative leave from September 16, 2014 until October 4, 2014.

An Initial Decision was issued on February 27, 2015. The AJ held that Employee failed to meet her burden of proof in establishing jurisdiction before this Office. Specifically, he determined that her decision to resign was voluntary. He also provided that there was no credible evidence to suggest that Agency coerced her into making the decision to leave her position. In addition, the AJ noted that Employee's placement on administrative leave after submitting her letter of resignation had no bearing on her job status or her right to accrue pay and benefits. He, therefore, dismissed her appeal for lack of jurisdiction.

Employee disagreed with the AJ's decision and filed a Petition for Review with OEA's Board on April 3, 2015. In her petition, she argues that the AJ ignored applicable case law and

evidence to support her argument that she resigned involuntarily as a result of objectively intolerable working conditions. In addition, she reiterates that the AJ erred in determining that Agency did not procure her resignation by the use of coercion or duress. Consequently, Employee asks that the Initial Decision be overturned.

Agency filed its Answer to Employee's Petition for Review on May 6, 2015. It argues that the AJ's finding that she resigned voluntarily is supported by substantial evidence. Moreover, Agency contends that the Initial Decision did not disregard any applicable case law in finding that OEA lacks jurisdiction over the instant matter. It maintains that Employee's Petition for Review should be denied, and the Initial Decision should be upheld.

6. Kevin Baldwin v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0070-12 – Employee worked as a Youth Development Representative with Agency. Agency issued a notice of final decision terminating Employee for “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, incompetence, and misfeasance; any act which constitutes a criminal offense whether or not that act results in conviction: attempted second degree cruelty to children and simple assault; and any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: violation of DYRS Reporting Unusual Incidents Policy, violation of DYRS Use of Force Policy, and violation of the DYRS and District Employee Conduct Policies.” The effective date of Employee's termination was January 31, 2012.

The AJ issued his Initial Decision on January 14, 2015. He found that while the youth acted in an aggressive manner, the excessive force used by Employee was unnecessary. Moreover, the AJ stated that Employee aggravated the circumstances. Hence, he posited that Employee failed to follow instructions and the safety rules taught to him regarding excessive force and precautions pertaining to the safety of youth. Additionally, he held that Employee was careless in his work performance and was, therefore, incompetent in applying Agency's Use of Force policy. Because Employee was charged with simple assault and attempted second degree cruelty to children, the AJ ruled that Agency proved that it had cause for the charge of any act which constitutes a criminal offense whether or not the act results in conviction. However, he found that Agency failed to prove the misfeasance charge. Because removal was within the range of penalties for neglect of duty and acts which constitute a criminal offense, the AJ upheld Agency's decision to terminate Employee.

Prior to filing his Petition for Review, Employee filed four requests for extensions to file his Petition for Review. He explained that he needed additional time to secure an attorney to represent him on appeal. Employee filed a Petition for Review with the OEA Board on May 18, 2015. He makes many of the same arguments previously decided by the AJ. Employee asserts that Agency violated its thirty-five day deadline to complete investigations. He provides that Agency's witness, Tony Newman, committed perjury when testifying about the deadline. He also claims that Agency violated his rights by placing him on enforced leave. Accordingly, Employee requests that the Board reverse his termination with back pay or remand the matter for further consideration.

7. Dana Brown v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0036-07R12 – Employee worked as a Juvenile Justice Institutional Counselor at Agency. On February 2, 2005, Employee fell on ice at Agency's Oak Hill facility. She was totally disabled and had to undergo rehabilitative treatment. She was placed on leave without pay (“LWOP”) on March 3, 2005, so that she could receive Worker's Compensation.

In her Initial Decision on Remand, the AJ found that Agency had cause to remove Employee. She reasoned that in accordance with D.C. Official Code § 1-623.45(b)(1), Employee could have resumed employment in her position if she overcame her injury or disability within one year. However, Employee was still disabled one year after she started to receive disability benefits. Additionally, the AJ opined that Employee did not provide documentation that she overcame her disability until January 29, 2008. Because she provided that documentation after Agency properly terminated her, the AJ held that Employee's argument regarding D.C. Official Code § 1-623.45(b)(2) amounted to a grievance, over which OEA lacked jurisdiction to consider. Accordingly, she ordered that Employee's removal action be upheld.

Employee filed a Petition for Review on June 1, 2015. She argues that the Initial Decision on Remand failed to address if Agency had cause to terminate her. Employee provides that Agency removed her because she "did not satisfactorily perform one or more of her job duties because she failed to submit medical documentation certifying her medical status." However, she contends that – despite Agency's assertion – she did provide medical documentation certifying her medical status. Hence, it is her position that the AJ should have conducted an evidentiary hearing. Additionally, she asserts that the AJ improperly held that her desire to invoke D.C. Official Code § 1-623.45(b)(2) was a grievance. Moreover, she claims that Agency never provided notice of her right to grieve. Thus, Employee requested that this Board reinstate her to her position.

Agency disagreed and filed an Opposition to the Petition for Review on July 2, 2015. It provides that because Employee did not overcome her disability within one year, she no longer had retention rights to her former position. Therefore, it had cause to remove her because she could not perform her job functions.

8. Brendan Cassidy v. D.C. Public Schools, OEA Matter No. 2401-0253-10R13 – Employee worked as an English teacher with Agency. On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009.

The AJ issued his Initial Decision on Remand on May 28, 2015. He held that Agency should have used D.C. Official Code § 1-624.08 instead of D.C. Official Code § 1-624.02, because the RIF was taken as the result of budgetary constraints. Consequently, he provided that, in accordance with D.C. Official Code § 1-624.08, Employee was entitled to one round of lateral competition and thirty days' notice. The AJ ruled that Employee was provided thirty days' notice. As for the one round of lateral competition, he reasoned that McKinley Technology High School was properly designated as Employee's competitive area, and ET-15 English Teacher was the competitive level. The AJ used Title 5, DCMR § 1503.2 *et al.* and 1503.1 when analyzing Employee's one round of lateral competition. He offered a detailed and thorough analysis of the CLDF and pre-text arguments raised by Employee. Ultimately, the AJ held that Agency met its burden of proof and upheld its RIF action.

Employee disagreed with the AJ's decision and filed a Petition for Review on Remand on July 2, 2015. Employee contends that the AJ's decision failed to consider that Agency did not properly administer the RIF because of its use of Title 5, DCMR § 1503.2 *et al.*, instead of DPM Chapter 24. He explains that Chapter 24 of the DPM does not grant an agency head the discretion to assign different weights to factors provided in the one round of lateral competition. Employee also asserts that Agency did not place him on the priority reemployment list. As for the AJ's rulings on the CLDF and pre-text issues, Employee opines that they are not based on substantial evidence.

On August 5, 2015, Agency filed its Response to Employee's Petition for Review on Remand. It provides that because Employee's argument regarding Chapter 24 of the DPM was not raised before the close of the evidentiary hearing, the OEA Board cannot consider this issue on appeal. Moreover, it contends that the issue cannot be considered because the Board did not outline Chapter 24 of the DPM as one of the issues for the AJ to address on remand. Agency goes on to argue that if Chapter 24 should have been considered, it still complied with those requirements. It explains that the relevant section of DPM Chapter 24 requires that tenure of appointment, length of credible service, Veteran's preference, residency preference, and relative work performance be considered to determine if an employee is retained or released. It asserts that it considered all of these factors. Therefore, its decision to RIF employee was proper. Accordingly, Agency requests that this Board uphold the AJ's Initial Decision on Remand.

9. Cecile Thorne v. D.C. Public Schools, OEA Matter No. 1601-0123-13 – Employee worked as a teacher with Agency. On July 27, 2013, Agency issued a written notice to Employee informing her that she was being terminated after receiving a final rating of "Ineffective" under IMPACT, Agency's performance assessment system during the 2012-2013 school year. The effective date of the termination was August 10, 2013.

An Initial Decision was issued on March 30, 2015. The AJ stated that the Collective Bargaining Agreement ("CBA") between Agency and the WTU applied to this matter; however, OEA's jurisdiction was limited to determining whether Employee was terminated for cause. Under Section 15.4 of the CBA, "the standard for separation under the [IMPACT] evaluation process shall be 'just cause,' which shall be defined as adherence to the evaluation process only." In her analysis, the AJ concluded that Agency improperly placed Employee in IMPACT Group 2, instead of Group 2a. The AJ provided that during the 2012-2013 school year, Group 2a was reserved for Early Childhood Education Teachers; whereas, Group 2 consisted of General Education Teachers in grades one through twelve. She further determined that Employee's position of record at the time of termination was an Early Childhood Education Teacher, as reflected by her Official Notification of Personnel Action Form ("SF-50"). Because Employee was evaluated under the improper IMPACT guidelines, the AJ held that Agency failed to meet its burden of proof in showing that it adhered to the IMPACT process. Therefore, it was ordered to reinstate Employee with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on May 4, 2015. It argues that the AJ's findings were not based on substantial evidence and that the Initial Decision was based on an erroneous interpretation of law. According to Agency, the AJ erred in holding that Employee should have been placed in IMPACT Group 2a. It states that the classification of IMPACT groups is based on the primary subject that the teacher, in fact, teaches. In support thereof, Agency cites to Employee's teaching schedule, which reflects that she taught pre-school, kindergarten, first grade, second grade, and third grade during the relevant school year. In addition, it asserts that the AJ accorded little weight to the IMPACT Team's determination that a teacher's subject area may result in more than one possible IMPACT Group. Agency believes that it was within its discretion to assign Employee to Group 2, instead of Group 2a. Accordingly, it asks this Board to dismiss Employee's Petition for Appeal and declare that Agency did not err in rating her as "Ineffective" under IMPACT. In the alternative, Agency requests that the matter be remanded to the AJ for a full evidentiary hearing.

10. Juan Johnson v. Metropolitan Police Department, OEA Matter No. 1601-0102-14 -- Employee worked as a Police Officer with Agency. On May 1, 2014, Agency issued its Final Notice of Adverse Action to Employee informing him that he was being suspended for forty days, with five days held in abeyance. Specifically, Employee was charged with violating Metropolitan Police General Order Series 120.21 for Conduct Unbecoming of an Officer. The charges stemmed from an October 20, 2013 incident wherein he was observed sleeping inside of his personal vehicle while off-duty, allegedly under the influence of alcohol. The effective date of Employee's suspension was June 24, 2014.

The AJ issued an Initial Decision on April 29, 2015, dismissing Employee's appeal. The AJ held that dismissal was appropriate in light of OEA Rule 621.3, 59 DCR 2129 (March 16, 2012), which provides that an appeal may be dismissed if a party fails to take reasonable steps to prosecute or defend an appeal before this Office. Employee failed to make himself available for the March 30, 2015 telephonic Status Conference. He also failed to file a statement of cause on or before the required deadline. The AJ, therefore, dismissed his Petition for Appeal for failure to prosecute.

Employee subsequently filed a Petition for Review with OEA's Board on June 2, 2015. He does not address any of the issues raised in the Initial Decision regarding his failure to prosecute his Petition for Appeal. Instead, Employee offers several explanations and arguments regarding the charges levied against him in Agency's Final Notice of Adverse Action. Agency did not submit a response to Employee's petition.

11. Juan Johnson v. Metropolitan Police Department, OEA Matter No. 1601-0064-14 – Employee worked as a Police Officer with Agency. On October 23, 2013, Agency issued a Notice of Proposed Adverse Action to Employee advising him that he would be suspended for thirty-five days. Employee was charged with violating Agency's General Order ("GO") Series 120.21 for "Conduct Unbecoming of an Officer," "Prejudicial Conduct," and "Failure to Obey Orders and Directives." The charges stemmed from a June 19, 2013 incident in which Employee was found sleeping inside of his personal vehicle while under the influence of alcohol. In addition, it was reported that several police officers stopped Employee for Driving Under the Influence ("DUI") following a previous arrest. On December 17, 2013, Employee was served with a Final Notice of Adverse Action. The Prejudicial Conduct charge was dismissed, and he admitted to the Failure to Obey Directives charge. Accordingly, his penalty was reduced to a twenty-five day suspension, with five days held in abeyance.

The AJ issued an Initial Decision on April 28, 2015. He held that Employee's January 2, 2014 letter to Agency included an admission that he failed to obey General Order 120.21 by carrying a firearm while consuming alcohol. The AJ further relied on Employee's admission that he carried his off-duty weapon in an unauthorized holster. Accordingly, he determined that Employee's actions constituted conduct unbecoming of an officer and prejudicial conduct. He also stated that Agency established that it had cause to take adverse action against him. In addition, the AJ concluded that the penalty of a twenty-five day suspension, with five days held in abeyance, was appropriate under the circumstances. He, therefore, upheld Employee's suspension.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on June 2, 2015. He argues that there is insufficient evidence in the record to prove that his actions constituted conduct unbecoming of an officer. Again, he explains that he was not under the influence of alcohol on June 19, 2013 when he was approached by Corporal White. According to Employee, White should have offered him a Blood Alcohol Content ("BAC") test

to conclusively prove that he was actually under the influence of alcohol. Therefore, he asks this Board to reduce his punishment to either a five or a seven day suspension.

12. Abraham Evans v. Metropolitan Police Department, OEA Matter No. 1601-0081-13 – Employee worked as a Police Officer with Agency. On June 26, 2012, Agency issued a Notice of Proposed Adverse Action to Employee, charging him with “Failure to obey orders and directives issued by the Chief of Police” and “Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer....” Specifically, Employee was alleged to have violated Agency’s General Order Series 120.21 by providing security for Calvert Woodley Liquor Store between December 15, 2008 and May 4, 2009. The notice also stated that he received discounts from the liquor store and purchased wine while on duty. Lastly, Employee was charged with making untruthful statements during an investigation of his alleged misconduct.

An Initial Decision was issued on April 6, 2015. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department* 801 A.2d 86 (D.C. 2002), OEA may not conduct a *de novo* hearing, but must rather base its decision solely on the record if certain conditions are met. Having determined that each condition set forth in *Pinkard* was met, the AJ stated that the issues to be decided before OEA were: 1) whether the Adverse Action Panel’s decision was supported by substantial evidence; 2) whether there was harmful procedural error; and 3) whether Agency’s termination action was done in accordance with applicable laws or regulations. According to the AJ, on January 21, 2011, the date Employee was indicted on criminal charges in the United States District Court, was the latest date on which Agency should have known of his alleged misconduct. However, Agency did not issue its Notice of Proposed Adverse Action to Employee until June 26, 2012. Because more than ninety days elapsed between the two dates, the AJ found that Agency committed harmful procedural error, thus violating D.C. Official Code § 5-1031. He, therefore, reversed Agency’s termination action and ordered that Employee be reinstated with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA’s Board on May 11, 2015. It argues that the AJ’s findings were based on an erroneous interpretation of law, statute, or regulation. Specifically, Agency submits that it did not violate the ninety-day rule with respect to Charge No. 1 and Charge No. 2 because Employee was the subject of an ongoing criminal investigation. Under D.C. Code § 5-1031(b), the time limit for commencing an adverse action against Employee should have been tolled until February 17, 2012, the date on which the U.S. Attorney’s Office issued a Letter of Declination. According to Agency, if the AJ had used the correct date in calculating the ninety-day period, he would have concluded that it did not commit a harmful procedural error. With respect to Charge No. 3 (Untruthful Statements), Agency contends that it could not have known about Employee’s statements until February 22, 2012, the date on which he allegedly made false statements during his interview with MPD’s Internal Affairs Division. Accordingly, it asks this Board to reverse the Initial Decision, or remand the matter to the AJ for further proceedings that flow rationally from the correct factual findings.

Employee filed an Answer to Agency’s Petition for Review on August 5, 2015. He contends that Agency waived its argument regarding compliance with the ninety-day rule because the issue was not raised in its January 23, 2015 brief. He further maintains that the AJ properly considered D.C. Code § 5-1031(a) in his analysis of Agency’s termination action. Employee believes that the Petition for Review should be denied, and the Initial Decision should be upheld.

13. Edward Morgan v. D.C. Fire and Emergency Medical Services Department, OEA Matter No. 1601-0039-13 – Employee worked as an Emergency Medical Technician with Agency. On November 26, 2012, Agency issued a notice of final decision removing Employee for “any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to wit: [] incompetence. Specifically, Agency claimed that Employee failed to maintain both his national and District of Columbia certification. The effective date of Employee’s termination was November 29, 2012.

The AJ issued her Initial Decision on May 29, 2015. She explained that Agency’s notice contained a provision that specifically stated that the new policy superseded all prior policies and/or issuances regarding EMS certification. She found that Agency had cause to take adverse action against Employee because he failed to obtain the NREMT certification which rendered him unable to legally perform the functions of his job. However, the AJ found that the penalty of termination was not supported by the record. She reasoned that in accordance with DPM § 1619, removal was not within the range of penalties for a first time offense of incompetence. Therefore, she ordered that Agency’s termination be reversed and that he be suspended for fifteen days instead. Additionally, she ordered that Agency reimburse Employee with back pay and benefits.

Subsequently, on July 6, 2015, Agency filed a Petition for Review. It argued that OEA’s decision to reinstate Employee was an abuse of discretion and should be reversed. Agency reiterates that it applied the *Douglas* factors and considered the Table of Appropriate Penalties within the DPM before removing Employee. Agency admits that the Table of Penalties does not list removal as a penalty for a first offense of incompetence. However, it contends that Employee’s termination was appropriate because he failed to obtain the requisite NREMT certification. It explains that OEA previously held in *Ronnie Williams v. District of Columbia Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0206-11R13 (February 11, 2014), that an employee’s failure to obtain the NREMT certification is a basis for termination due to incompetence. Additionally, Agency cites to *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07R12 (April 30, 2015) and *Robin Halprin v. D.C. Department of Mental Health*, OEA Matter No. 1601-0107-08 (February 23, 2015), where both employees were terminated for a first offense of incompetence. It provided that in both cases, the employees were unable to perform their job functions due to a disability. According to Agency, OEA ruled that once the employees’ disability exceeded the statutory time frame, they lost their retention rights, and Agency was permitted to remove them. Therefore, it requests that its Petition for Review be granted and its decision to remove Employee be upheld.

14. Carlene Thompson v. D.C. Public Schools, OEA Matter No. 2401-0122-14 – Employee worked as an Administrative Aide with Agency. On May 19, 2014, she received a notice from Agency that she would be removed from her position due to a RIF. The effective date of Employee’s removal was August 8, 2014.

The AJ issued her Initial Decision on January 20, 2015. She held that Employee was not entitled to one round of lateral competition since she was in a single-person competitive level. She reasoned that because the entire competitive level was eliminated, Agency was not required to rank or rate Employee in accordance with D.C. Official Code § 1-624.08(e). Additionally, the AJ ruled that Agency properly provided Employee with thirty days’ notice prior to the effective date of the RIF action. Therefore, she upheld Agency’s decision to remove Employee pursuant to the RIF.

On July 15, 2015, Employee filed a Petition for Review. She argues that Agency tampered with the Notification of Personnel Action form by revising the original document and making adjustments to her salary. Employee explains that although her thirty-day period to appeal had expired, she felt obligated to report Agency's unethical actions.

15. Sabrina Bettard v. Department of General Services, OEA Matter No. 1601-0075-14 – Employee worked as a Program Support Specialist with Agency. Agency issued a notice of final decision removing Employee from her position for “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: unauthorized absence and absence without official leave; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, i.e., inability to fulfill requirements for the position of Program Support Specialist.” The effective date of Employee's removal was April 7, 2014.

An AJ was assigned to her case and issued an order requesting that Employee and Agency attend a Status Conference. Both parties were present for the conference. Subsequently, the AJ issued an order requiring the parties to submit briefs addressing the issues raised during the Status Conference.

Agency submitted its brief in a timely manner. However, Employee did not submit her brief by the deadline. As a result, the AJ issued an Order for Statement of Good Cause due to Employee's failure to submit her brief.

Employee did not submit her Brief or Statement of Good Cause. Therefore, the AJ issued an Initial Decision on March 25, 2015. She held that in accordance with OEA Rule 621.1, Employee's appeal was dismissed for failure to prosecute.

On April 28, 2015, Employee filed a Petition for Review. She argues that her absence was not unauthorized. Employee asserts that she was on Family Medical Leave. Additionally, she makes several arguments related to Agency's unwillingness to make reasonable accommodations for her pursuant to the American with Disabilities Act. Therefore, she requested that she be reinstated to her position with back pay and damages.

16. Michael Willis v. D.C. Fire and Emergency Medical Services, OEA Matter No. J-0043-15 – Employee worked as a Deputy Fire Chief with Agency. On December 10, 2014, Employee submitted an Optional Retirement application to Agency. He requested that his retirement become effective on January 10, 2015. Agency's Interim Fire Chief, Eugene Jones, granted his request by letter dated December 22, 2014. Employee subsequently asked to rescind his retirement application on January 5, 2015. The request was denied by Agency on January 9, 2015.

An Initial Decision was issued on May 20, 2015. The AJ stated that OEA has consistently held that there is a legal presumption that retirements are voluntary. In addition, she cited to *Watson v. District of Columbia Water and Sewer Authority*, 923 A.2d 903 (2007), wherein the D.C. Court of Appeals held that once an employee resigns from his or her job, the employer's decision not to accept a subsequent withdrawal or the resignation does not change the employee's act into an involuntary one. The AJ also highlighted DPM Instruction No. 8-53, 9-25, 36-3, and 38-12, which authorizes an employee to withdraw his or her retirement application before the effective date of separation. However, such request to withdraw a retirement application may be disapproved when an agency has a valid reason for doing so and

explains the reason in writing to the employee. According to the AJ, Agency had a valid reason for denying Employee's request to withdraw his retirement application because it already made a commitment to hire and promote another Fire Chief to fill his position. She, therefore, determined that Employee's decision to retire was voluntary and that Agency properly denied his subsequent attempt to withdraw his retirement application. As a result, the matter was dismissed for lack of jurisdiction.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on June 22, 2015. He argues that Agency coerced him into completing and submitting the Optional Retirement application; thus, rendering his retirement involuntary. Employee also states that he did not technically apply for retirement until January 12, 2015, because his application was not considered complete until it was forwarded to the D.C. Retirement Board for approval. He further asserts that he clearly communicated to Agency his intent not to retire in writing, as required by Agency policy. Consequently, Employee asks this Board to reverse the Initial Decision and find that his retirement was involuntary.

Agency filed an Answer to Employee's Petition for Review on July 24, 2015. It reiterates that OEA lacks jurisdiction over Employee's appeal because he voluntarily retired from his position as Deputy Fire Chief. In addition, Agency provides that it was irrelevant that Employee did not complete all of the paperwork necessary to process his retirement application because it was within its discretion to rely upon his initial request to retire. It argues that the AJ correctly determined that OEA lacks jurisdiction over Employee's appeal. Therefore, Agency requests that his Petition for Review be denied.

17. Anthony Dyson v. D.C. Department of Corrections, OEA Matter No. 1601-0079-14 – Employee worked as a Correctional Officer with the D.C. with Agency. On April 14, 2014, Agency issued an Advance Notice of Proposed Removal charging Employee with “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically neglect of duty: failure to follow instructions or observe precautions regarding safety; and misfeasance: providing misleading or inaccurate information to superiors. The charges stemmed from a January 12, 2014 incident wherein Employee failed to take action after witnessing an inmate attack another inmate with a sharp instrument. Agency claimed that he also provided false information during an internal investigation conducted by the Office of Investigative Services (“OIS”).

On May 7, 2014, a Hearing Officer conducted an independent review of the evidence in support of Agency's removal action. The Hearing Officer opined that the charges against Employee should be sustained; however, he recommended that the penalty be reduced from removal to a suspension of at least thirty days and a reduction in grade/pay. Agency issued its Notice of Final Decision on May 20, 2014. Its Director, who was the deciding official, sustained the charges against Employee and adopted the Hearing Officer's recommended penalty of a thirty-day suspension and a demotion. Employee's suspension was effective from May 23, 2014 through June 21, 2014. His reduction in grade became effective on June 29, 2014.

The AJ issued her Initial Decision on June 10, 2015. She determined that Agency had cause to take adverse action against Employee for neglect of duty and misfeasance. With respect to the penalty, the AJ provided that Agency did not abuse its discretion, act arbitrarily, or fail to consider the relevant *Douglas* factors when it selected the penalty to impose upon Employee. She also noted that his penalty was less severe than the penalty imposed on other employees who engaged in similar conduct. Consequently, the AJ upheld Agency's decision to suspend and demote Employee.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on July 4, 2015. He first submits that other Correctional Officers were punished less severely than him for similar misconduct. Additionally, Employee asserts that the AJ erroneously concluded that OEA was guided by the DPM and not the Collective Bargaining Agreement in this matter. Lastly, he reiterates his belief that the Hearing Officer recommended a fifteen-day suspension, and not a thirty-day suspension. Employee, therefore, requests that this Board grant his Petition for Review. In response, Agency argues that the AJ properly evaluated the consistency of the penalty imposed on Employee. It states that the new evidence regarding other Correctional Officers being disciplined disparately should not be considered by the Board because Employee failed to explain why he could not produce the documents to the AJ. According to Agency, the AJ addressed the appropriateness of Employee's penalty in accordance with the DPM and the *Douglas* factors. Thus, it opines that the Petition for Review should 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