

**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 17, 2022, at 9:00 a.m. The Board will meet remotely. Below is the agenda for the meeting.

Members of the public are welcome to observe the meeting. In order to attend the meeting, please visit: <https://dcnet.webex.com/dcnet/onstage/g.php?MTID=e84621b85f3d6420ff1e93fa2cb904e95>

Event password: board

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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.

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

Agenda

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

Thursday, November 17, 2022, at 9:00 a.m.

Location: Virtual Meeting via Webex

I. Call to Order

II. Ascertainment of Quorum

III. Adoption of Agenda

IV. Minutes Reviewed from Previous Meeting

V. New Business

A. Public Comments on Petitions for Review

B. Summary of Cases

- 1. Employee v. Office of Unified Communications, OEA Matter No. 1601-0022-21** – Employee worked as a Telecommunications Equipment Operator with the Office of Unified Communications ("Agency"). On March 11, 2021, she received a final notice of separation from Agency. The notice provided that on October 14, 2020, Employee submitted a urine sample which tested positive for the presence of marijuana, in violation of 6-B District of Columbia Municipal Regulations ("DCMR") §§ 435.6 and 1605.4(h). Consequently, Employee was terminated effective March 12, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 9, 2021. She explained that she was a patient enrolled in the medical marijuana program. Consequently, she presented her medical marijuana card to the Medical

Review Officer immediately after testing, in accordance with Issuance I-4-34 of the District Personnel Manual (“DPM”). Employee reasoned that she was not challenging the positive test results, but she did deny being under the influence while on duty. She provided that on October 14, 2020, she was notified by a family member that her brother had passed away. However, several hours later, Employee learned that she received misinformation about her brother and that he was not deceased, but he was in the hospital for a drug overdose. Employee explained that she did not sleep prior to her shift at Agency because she was grieving the perceived loss of her brother and because she had to pick him up from the hospital. Accordingly, she requested that Agency’s termination be reversed.

On July 15, 2021, Agency filed its Answer to Employee’s Petition for Appeal. It provided that as a Telecommunications Equipment Operator, Employee was responsible for critical tasks that required her to make rapid decisions and execute actions simultaneously. Agency explained that after Employee’s supervisor, LaQuencyer Johnson, performed a daily temperature check, she noticed a change in Employee’s verbal communication; observed that she was withdrawn or less involved with people; noted that she appeared incoherent; and observed that her eyes were glossy and red. Agency asserted that Employee was asked to leave the operations floor and instructed to wait in her supervisor’s office. Subsequently, Agency contacted its Human Resources department and completed a Reasonable Suspicion Observation form for Employee to submit to a reasonable suspicion drug test. According to Agency, Employee was asked to leave for the day. Thereafter, Agency provided that Employee’s reasonable suspicion test results came back positive for marijuana. Consequently, it proposed separation pursuant to the Douglas factors and DPM §§ 428.1 and 1607.2(g)(2), which provided that the penalty for a first offense for testing positive for intoxicants while on duty ranged from suspension to removal. Therefore, it requested that Employee’s removal action be upheld.

Prior to the evidentiary hearing, the OEA Administrative Judge (“AJ”) ordered the parties to submit briefs and provide supporting documents to address: (1) Agency’s drug testing policy, specifically as it applies to reasonable suspicion referrals for employees with a medical marijuana license/card; (2) whether Ms. Miller and Ms. Johnson were trained reasonable suspicion supervisors, and if so, for Agency to provide their training dates and training completion certificates; (3) the reasonable suspicion form completed by Ms. Miller and Ms. Johnson, following their observations of Employee; and (4) whether the penalty of termination was appropriate under District law, regulations, or the Table of Illustrative Actions.

In its brief, Agency explained that all employees, including employees with medical marijuana cards, may be subject to reasonable suspicion testing when a proper referral is made by a trained supervisor or manager. It contended that both Ms. Johnson and Ms. Miller were trained reasonable suspicion supervisors. Finally, Agency asserted that pursuant to 6-B DCMR § 428.1, any positive drug test result shall result in removal. As a result, it requested that Employee’s removal action be upheld.

In her brief, Employee argued that Agency accepted her medical marijuana card during the random drug testing. Additionally, she argued that the Table of Illustrative Actions in 6-B DCMR § 1605.4(h) provided that the penalty for a first offense is suspension to removal, and the penalty for a second offense is removal. Employee contended that Agency should not have removed her on the first offense. Moreover, Employee asserted that pursuant to District Personnel Instruction No. 4-39, an employee shall remain on

administrative leave until the testing results are received. However, Agency allowed her to continue her tour of duty instead of placing her on administrative leave.

After conducting an evidentiary hearing, the AJ issued her Initial Decision on July 25, 2022. She found that Agency allowed Employee to return to the floor and take calls after Ms. Johnson and Ms. Miller's reasonable suspicion observations. The AJ held that pursuant to 6-B DCMR § 432.2, an employee can only be referred to reasonable suspicion testing if the supervisor has reasonable suspicion that the employee is under the influence, to the extent that their ability to perform their job is impaired. The AJ reasoned that because Employee was allowed to take calls proved that neither supervisor had a reasonable suspicion that Employee was impaired in a manner that prohibited her from performing her duties. Moreover, the AJ noted that Employee testified that she did not smoke marijuana and was not impaired on October 14, 2020. The AJ further highlighted that Employee provided documentary evidence consistent with her assertion that her brother was admitted to the hospital for acute substance intoxication on October 14, 2020, at 8:15 a.m. and was discharged at 1:41 p.m. Thus, she found that it was plausible that Employee's grieving and crying, coupled with a lack of sleep, could have caused Employee's red or glossy eyes; her appearance of incoherence; or changes in her behavior. Therefore, the AJ held that Employee presented clear and convincing evidence to rebut the presumption of impairment. Consequently, she ordered that Agency's termination action be reversed; that Agency reinstate Employee; and that Agency reimburse Employee all pay and benefits lost as a result of her removal.

On August 29, 2022, Agency filed a Petition for Review. It argues that the Initial Decision is based on an erroneous interpretation of statute and unsupported by substantial evidence. Agency maintains that it did have reasonable suspicion to test Employee. It argues that the AJ improperly relied on the fact that Employee was allowed to return to work after her supervisors' reasonable suspicion observations and that allowing Employee to return to work was merely poor judgment or inadequate supervision. Additionally, Agency contends that there is no policy or regulation that prohibits an employee from working pending their test results. Finally, Agency asserts that Employee did not rebut the presumption of impairment with clear and convincing evidence. Agency opines that Employee's testimony was self-serving and lacked credibility. As a result, it requests that its Petition for Review be granted, and the Initial Decision be reversed.

- 2. Employee v. Department of Small and Local Business Development, OEA Matter No. J-0009-18R20R21** – This matter has been previously before the Office of Employee Appeals' ("OEA") Board. Employee worked as an Administrative Officer with the Department of Small and Local Business Development ("Agency"). On September 11, 2017, Employee received a notice of termination. According to Agency, Employee was removed from her position during her probationary period. The effective date of removal was October 9, 2017.

On January 29, 2018, the Administrative Judge ("AJ") issued her Initial Decision. Employee filed a Petition for Review of the Initial Decision. In her petition, Employee submitted a document titled "Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments." The OEA Board held that because the Administrative Officer's position was listed as a non-competitive appointment, Employee's appointment was not the result of open competition. Thus, the Board ruled that there was not substantial evidence in the record to support the AJ's ruling regarding open competition. Therefore, it remanded the matter to the Administrative Judge for further consideration.

The AJ issued an Initial Decision on Remand on May 29, 2020. She held that Agency did not have cause to terminate Employee, and it did not consider the relevant factors before removing her. As a result, she ordered that Agency's action be reversed and that Employee be reinstated with back pay and benefits lost as the result of her removal.

On September 21, 2020, Employee filed a Petition for Enforcement. She provided that Agency's General Counsel informed her that she would not be reinstated because she was a term employee, and her term expired. Subsequently, the AJ held a status conference to determine Agency's compliance with the Initial Decision on Remand.

The Administrative Judge issued an Addendum Decision on Compliance on February 17, 2021. She explained that Employee contended that upon the expiration of her term appointment, she should have reverted to her previous permanent appointment status, which she acquired from the District of Columbia Human Resources ("DCHR"). The AJ opined that the final order issued by OEA was to reinstate Employee to her previous position of record within the Department of Small and Local Business Development. She found that Employee forfeited her Career Service, permanent appointment at DCHR for a Career term appointment position with Agency. Consequently, the AJ held that because Agency decided not to extend Employee's term appointment past the designated end date, it was not required to reinstate Employee. She ordered that Agency reimburse Employee with back pay and benefits from the time she was wrongfully terminated until the expiration date of her term appointment.

On March 23, 2021, Employee filed a Petition for Review. She argued that she previously worked at DCHR as a Career permanent employee. Subsequently, she accepted a new position with Agency with an increased salary, at a different work site, and as a term employee. However, Employee asserted that when her term appointment expired, she was entitled to revert to her previous Career permanent status. It was Employee's position that a promotion from one District government agency to another was considered an internal placement and triggered her Career permanent protections. As a result, she requested that this Board reverse the Addendum Decision on Compliance and order that she be reinstated to a Career permanent position.

Agency filed an Opposition to Employee's Petition for Review on April 27, 2021. It argued that the OEA Board lacked jurisdiction to review Employee's petition. Agency contended that the Board could review initial decisions but not decisions on compliance. Moreover, Agency explained that Employee resigned from her position with DCHR and accepted a new position with Agency under a term appointment. It opined that in accordance with DPM §§ 823 and 826, an employee hired under a term appointment cannot be converted to a permanent appointment if the initial appointment was made non-competitively. Agency reasoned that given the previous decisions issued in this case, it is undisputed that Employee was hired non-competitively, under a term appointment. Therefore, it was required to reimburse Employee back pay and benefits through the expiration of her term appointment date. Accordingly, it requested that this Board deny Employee's petition.

In its Second Opinion and Order on Petition for Review, the Board held that Employee was attempting to have it address issues that were decided in the Initial Decision on Remand. It reasoned that pursuant to OEA Rule 632.2, Employee had the opportunity to appeal the Initial Decision on Remand before the requisite deadline. She did not. Thus, it ruled that Employee's Petition for Review be denied on the basis that the Initial Decision on Remand was final and was not appealed to the Board within a timely manner.

Additionally, the Board found that it was not permitted to consider Petitions for Review of an Addendum Decision on Compliance because the OEA rules, related to compliance and enforcement, provided no procedural avenue for an employee to appeal an Addendum Decision on Compliance to the Board. It noted that the OEA Board previously denied Petitions for Review of Addendum Decisions on Compliance in *Employee v. D.C. Child and Family Services*, OEA Matter No. 1601-0058-01C07, *Opinion and Order on Petition for Review* (January 25, 2010); *Employee v. Department of Mental Health*, OEA Matter No. 1601-0046-12C16, *Opinion and Order on Compliance* (December 3, 2019); and *Employee v. Department of Health*, OEA Matter No. 2401-0020-10R17C19, *Opinion and Order on Petition for Review* (June 30, 2020). As a result, it ruled that the matter was improperly before the Board, and it also denied Employee's Petition for Review on that basis.

Employee appealed the Board's Second Opinion and Order to the Superior Court of the District of Columbia. The Court found that the AJ's Addendum Decision on Compliance should have been designated as a modified or supplemental Initial Decision, which would have been subject to appeal to the OEA Board. It held that the Initial Decision on Remand did not address the question of which position Employee should be reinstated; however, the AJ did address the issue in her Addendum Decision on Compliance. The Court reasoned that because the AJ undertook a process similar to that involved in reaching an Initial Decision – requiring briefs and clarifying or modifying her conclusions – the Initial Decision on Remand was not completed until the AJ made additional findings in the Addendum Decision on Compliance. Thus, it found that the Addendum Decision on Compliance was a supplemental or amended Initial Decision and remanded the matter to OEA for further consideration of the merits of the March 23, 2021, Petition for Review.

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

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