

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on April 13, 2023, at 9:00 a.m. The Board will meet remotely. Below is the agenda for the meeting.

Members of the public are welcome to observe the meeting. In order to attend the meeting, please visit: <https://dcnet.webex.com/dcnet/j.php?MTID=mca141a4ae00d3f9df672f361c94bb358>

Password: board (26274 from phones and video systems)

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

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

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

If you do not have access to the internet, please call-in toll number (US/Canada) 1-650-479-3208, Access code: 2313 314 1722.

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

Agenda

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

Thursday, April 13, 2023, at 9:00 a.m.

Location: Virtual Meeting via Webex

I. Call to Order

II. Ascertainment of Quorum

III. Adoption of Agenda

IV. Minutes Reviewed from Previous Meeting

V. New Business

A. Public Comments on Petitions for Review

B. Summary of Cases

- 1. Employee v. Department of Insurance, Securities, and Banking, OEA Matter No. 1601-0047-20** — Employee worked as a Fraud Investigator and an Equal Employment Opportunity ("EEO") Counselor for the D.C. Department of Insurance, Securities, and Banking ("Agency/DISB"). On April 28, 2020, she received a final notice of separation from Agency. The notice provided that Employee was in violation of 6-B District of Columbia Municipal Regulations ("DCMR") §§ 1605.4(a)(4) and 1607.2(a)(5) – off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position; § 1607.2(a)(10) – unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or

confidential information; and § 1607.2(a)(16) – use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct. Consequently, Employee was terminated on May 7, 2020.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on June 9, 2020. She asserted that her removal action was unwarranted. Employee argued that Agency’s Hearing Officer failed to meet the statutory deadline to file his written report and recommendation with the Deciding Official. She also provided that Agency failed to meet its burden of proof regarding the causes of action taken. Employee reasoned that although her emails could possibly be considered inappropriate, they do not justify termination. Therefore, she requested attorney fees, along with compensatory and punitive damages as a result of her removal.

On October 14, 2020, Agency filed its Answer to Employee’s Petition for Appeal. It denied Employee’s assertions and contended that it met all statutory deadlines. Agency explained that Employee engaged in misconduct by sending emails and documents to a broad audience, which contained language that was abusive, offensive, unprofessional, and generally unacceptable. It opined that some of Employee’s statements demonstrated her unauthorized disclosure of sensitive or confidential information. It was Agency’s position that the statements made by Employee, regarding other District government employees, casted doubt on its ability to maintain trust in Employee as a Fraud Investigator and an EEO Counselor. Moreover, Agency argued that Employee’s removal was within the range of penalties outlined in the Table of Illustrative Actions and pursuant to the *Douglas* factors. Therefore, it requested that OEA uphold its termination action.

The OEA Administrative Judge (“AJ”) ordered the parties to submit briefs addressing whether: 1) Agency’s adverse action against Employee was based on retaliation, and not for cause; 2) Employee’s electronic mails, which were the basis of the instant adverse action, were protected under the D.C. Whistleblower Protection Act (“DCWPA”); 3) Agency violated Employee’s union rights when it instituted the instant adverse action without notifying Employee’s union; 4) Employee’s December 2019 and January 2020 emails rose to the level of a formal grievance, and if so, whether Agency could use the content of a grievance report as justification for its adverse action against Employee; 5) Agency had cause to institute the current adverse action against Employee pursuant to District Personnel Manual (“DPM”) §§ 1605.4(a)(4) and 1607.2(a)(5), 1607.2(a)(10), and 1607.2(a)(16). Agency was required to outline the specific abusive, offensive, unprofessional, and unacceptable language in the December 2019 and January 2020 emails that it relied on for the instant adverse action; and 6) The penalty of termination was appropriate under District law, regulations, or the Table of Illustrative Actions.

In its brief, Agency asserted that it had cause to institute its adverse action against Employee and that removal was appropriate under the circumstances. It contended that Employee’s inflammatory emails, which disclosed sensitive information about high-level District government officials, called Employee’s trustworthiness into question. Agency asserted that Employee’s emails were not protected under the Whistleblower Protection Act. With regard to the retaliation claim, Agency asserted that complaints of unlawful discrimination are specifically handled by the Office of Human Rights under the District of Columbia Human Rights Act, and not the Office of Employee Appeals. With respect to notice, Agency explained that the Collective Bargaining Agreement (“CBA”) only obligated it to make a good faith attempt to notify the Union, which it did when it contacted and emailed its final decision to terminate Employee to her union president. As for the grievance issue, Agency asserted that Employee’s emails did not

constitute a formal grievance, and the emails were not raised in accordance with the applicable grievance procedures. Consequently, it requested that the AJ leave Agency's penalty of removal undisturbed.

In her brief, Employee argued that the December 2019 and January 2020 emails constituted a formal grievance and that her emails were protected under the DCWPA. She contended that Agency did not have cause for its adverse action under 6-B DCMR § 1605.4(a)(4). Employee asserted that she did not use language that was abusive, offensive, or unprofessional in her email correspondence. She claimed that the language she used was straightforward and factual. Moreover, she provided that she never made any unauthorized disclosures of sensitive or confidential information. Employee posited that all communications received were obtained through public sources of information, first-hand knowledge, or word of mouth. Additionally, she argued that 6-B DCMR § 1607.2(a)(5) provides that the penalty for the first offense is a thirty-day suspension; DCMR § 1607.2(a)(16) lists the range of penalties from counseling to a fifteen-day suspension; and Agency failed to meet its burden pursuant to DCMR § 1607.2(a)(10). Thus, she asserted that Agency's deviation from the suspension guideline was a clear abuse of authority.

Prior to issuing an Initial Decision, the AJ held a two-day evidentiary hearing. At the conclusion of the hearing, the AJ ordered that the record remain open for the limited purpose of having the parties provide documentation of the filed EEO discrimination complaints; documentary evidence of M.S. filing an EEO complaint; and an exit letter or log providing who served as K.P.'s EEO counselor. In response to the AJ's request, Employee provided affidavits from Employee and G.M. Included with the affidavit submissions were an email from M.S. and an exit letter and notice of right to file a formal complaint from G.M. to K.P.

On November 1, 2022, the AJ issued her Initial Decision. She found that Agency had cause for 6-B DCMR §§1605.4(a)(4) and 1607.2(a)(5) because Employee sent several emails that were not limited to her alleged grievances, which included personal and confidential information about other employees without verifying their veracity. The AJ determined that Employee's conduct of sending out emails with unverified information negatively affected her job performance, trustworthiness, and Agency's mission. Moreover, she held that Employee violated 6-B DCMR § 1607.2(a)(10) when she disclosed information, without consent, which was provided to her in her capacity as an EEO Counselor. The AJ also found that Employee violated the regulation when she included the names of employees who were allegedly discriminated against by Agency. Additionally, she ruled that Agency proved that Employee violated 6-B DCMR § 1607.2(a)(16) by her sharing emails that were unprofessional and offensive in nature. Consequently, the AJ upheld Agency's removal action.

On December 6, 2022, Employee filed a Petition for Review. She asserts that the AJ's decision was an erroneous interpretation of the law, and the findings were not based on substantial evidence. Employee alleges that the Initial Decision included testimony from K.P., who she contends was perjurious and incompetent and whose testimony should have been deemed inadmissible. She also offers "new, material evidence" of M.S.'s sworn testimony via affidavit which she claims was barred by the AJ. Specifically, Employee provides that the AJ should have allowed M.S. to testify as a witness during Employee's case in chief instead of as a rebuttal witness for Agency. She also argues that she had no prior opportunity to submit evidence from M.S. Employee reasons, through M.S.'s affidavit, that K.P. could not have served as the Deciding Official in this case, and as a result, Employee's termination was fraudulent. Employee maintains that she did

not violate 6-B DCMR § 1607.2(a)(10) by providing disclosed information without consent. She asserts that the AJ erred in her interpretation of the Table of Illustrative Actions. Additionally, she argues that the *Douglas* factors were not properly considered and contends that termination was too severe of a penalty. Finally, Employee claims that Agency violated the terms of its CBA by failing to provide notice to her union related to its proposed action against her. As a result, she requests that the Board reverse the AJ's ruling and that she receive payment of appropriate damages.

Agency filed its Reply to Employee's Petition for Review on January 30, 2023. It argues that M.S.'s affidavit should be stricken because it was submitted after the OEA record was closed, and her affidavit did not provide new and material evidence. Similarly, it opines that any arguments that K.P. perjured herself were also waived because they were not raised before the AJ. As for Employee's claim that K.P. could not serve as a Deciding Official for disciplinary matters, Agency provides that this argument was waived because she failed to make this argument before the AJ. It reasons that in accordance with 6-B DCMR § 1623, the Deciding Official could be the Agency's personnel authority or their designee. Therefore, Employee's argument that the Deciding Official had to be the Commissioner is inaccurate. Agency asserts that because M.S. retired five years prior to Employee's termination, the AJ made the correct decision not to allow her to testify, as it related to Employee's termination action. Agency also contends that OEA does not have jurisdiction over fraud claims, and Employee could not satisfy the elements of fraud. Agency attests that there is substantial evidence for its removal action under 6-B DCMR § 1607.2(a)(10), and the AJ correctly found that Employee violated the statute twice in her emails. Furthermore, Agency argues that removal was within the range of penalties, and it considered the *Douglas* factors when arriving at its penalty. Finally, as it relates to Employee's argument regarding lack of notice, Agency offers that it issued Employee's notice to her and her union representative on February 27, 2020. Consequently, it did comply with the notice terms of the CBA. Therefore, it requests that Employee's removal be upheld.

2. **Employee v. Office of the Attorney General, OEA Matter No. 1601-0054-22** — Employee worked as a Case Management Specialist for the Office of Attorney General ("Agency"). On May 13, 2022, Agency issued Employee a notice placing her on a sixty-day Performance Improvement Plan ("PIP"). According to the notice, Employee was placed on a PIP because of deficient performance in communication, customer service, and goal attainment. Agency provided that Employee displayed a lack of civility and was disrespectful to colleagues, management, and other Agency officials.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 23, 2022. In her appeal, she asserted that she was placed on a PIP and reluctantly transferred to a division with which she had no knowledge or expertise. She asserted that the PIP was retaliatory because she engaged in protected activities with her union; filed a complaint on bullying; used approved Covid-19 leave; and exposed unethical work practices. As a result, Employee argued that she was denied the right to respond or grieve a corrective action. Accordingly, she asked that OEA reverse her reassignment and the PIP.

On June 22, 2022, Agency filed a Motion to Dismiss. It argued that OEA lacked jurisdiction over transfers or PIPs. Agency asserted that Employee underwent a lateral transfer which did not impact her title, grade, position description, salary or benefits. Additionally, Agency argued that there was no final agency decision providing a basis for Employee's appeal to OEA, as required by D.C. Official Code § 1-606.03(a) and OEA Rule 604.1. It explained that Employee's transfer and PIP were not disciplinary

actions. Moreover, it contended that Employee submitted a step 4 grievance challenging her transfer and PIP. Accordingly, it requested that this matter be dismissed for lack of jurisdiction.

Prior to issuing an Initial Decision, the OEA Administrative Judge (“AJ”) ordered both parties to submit briefs on jurisdiction. Employee’s brief was due by July 24, 2022, and Agency’s brief was due by August 8, 2022. Agency timely filed its brief. However, Employee failed to provide a timely submission. Consequently, the AJ issued an Order for Good Cause Statement, which Employee was required to respond by October 10, 2022. On October 7, 2022, Employee responded and provided that she was experiencing health problems and did not intentionally miss the deadline. The AJ ruled that Employee established good cause and then, again, ordered that the parties brief the jurisdictional issue. Employee’s deadline was November 10, 2022, and Agency’s was November 18, 2022. However, on November 17, 2022, Employee filed a motion to voluntarily withdraw her appeal because she agreed that OEA lacked jurisdiction.

The AJ issued an Initial Decision on December 2, 2022. He determined that because Employee voluntarily withdrew her appeal, the matter was dismissed. As a result, the AJ dismissed the matter with prejudice. On December 6, 2022, Employee filed a Motion for Reconsideration. She explains that she voluntarily withdrew her petition because she was under stress and duress. Employee provides that she suffered from depression and anxiety, which was the result of work-place trauma and the side effects of chemotherapy. She also contends that Agency created a hostile work environment. Therefore, she requests that her petition be reconsidered.

Agency filed its response on March 13, 2023. It asserts that despite multiple OEA orders instructing her to address the issue of jurisdiction, Employee failed to do so and instead filed a Motion to Withdraw her appeal. Agency also contends that Employee failed to state a legal basis for her Petition for Review and failed to prove duress. It, again, argues that OEA lacks jurisdiction over Employee’s appeal. Therefore, Agency requests that Employee’s Petition for Review denied.

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

VI. Adjournment

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