

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS
NOTICE OF PUBLIC MEETING**

The District of Columbia Office of Employee Appeals will hold a meeting on May 19, 2022, at 11:00 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=ee27c7924e7f8406724a17753b9eca96d>

Event password: board

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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, May 19, 2022, at 11:00 a.m.

Location: Virtual Meeting via Webex

I. Call to Order

II. Ascertainment of Quorum

III. Adoption of Agenda

IV. Minutes Reviewed from Previous Meeting

V. New Business

A. Public Comments on Petitions for Review

B. Summary of Cases

1. **Employee v. Office of Police Complaints, OEA Matter No. 1601-0055-19** – Employee worked as an Investigator with the D.C. Office of Police Complaints ("Agency" or "OPC"). On May 14, 2019, Agency issued a final notice of separation removing Employee from his position effective on May 15, 2019. Agency charged Employee with failure to follow instructions: negligence, failure to comply with rules, regulations, written procedures, or proper supervisory instructions, 6B District of Columbia Municipal Regulations ("DCMR") § 1607.2(d)(1); conduct prejudicial to the District government: conduct that an employee should reasonably know is a

violation of law or regulation and unauthorized disclosure of confidential information, 6B DCMR § 1607.2(a)(4) and (10); conduct prejudicial to the District government: use of District service or funds for inappropriate or non-official purpose, 6B DCMR § 1607.2(a)(12); and conduct prejudicial to the District government: conduct that an employee should reasonably know is a violation of law or regulation and unauthorized disclosure of confidential information, 6B DCMR § 1607.2(a)(4) and (10).

Employee filed a Petition for Appeal with the Office of Employee Appeals on June 13, 2019. He argued that his termination was not taken for cause in accordance with chapter 16 of the DCMR. Employee asserted that Agency terminated him for working with his attorney to present a response to Agency's action. He conceded that he used Agency's transcription software which incurred a cost to the District of Columbia; however, he asserted that printing those documents was necessary for him to respond to Agency's action. Employee further contended that Agency did not notify him that he could not use evidence that he deemed relevant and necessary. Therefore, Employee reasoned that Agency's termination exceeded the bounds of reasonableness. Accordingly, he requested that he be reinstated with back pay and benefits.

In response, Agency provided that prior to the current action, Employee was issued a notice of proposed suspension on an unrelated issue. Employee was authorized to use four (4) hours of administrative leave to draft his response to the suspension action. Agency alleged that while gathering information for his response, Employee used government funds to purchase a transcript without authorization. Moreover, it argued that Employee utilized his body-worn camera account to access audit reports which included details of an open MPD investigation. Agency asserted that when it received Employee's response, it found that he provided information to his attorney, a member of the public, that contained unredacted, confidential government information, which violated Agency's policy. Agency offered several alternative options that Employee could have utilized to work with his attorney while maintaining confidential government information. It provided that Employee could have requested permission to access body-worn camera footage; made known to Agency, his desire to obtain a transcript; or sought consent to redact the confidential government information. Therefore, it requested that OEA uphold its termination action.

Prior to issuing an Initial Decision, the Administrative Judge ("AJ") held a two-day evidentiary hearing. In his Initial Decision, the AJ found that Agency committed procedural errors in removing Employee; however, he ruled that the errors were harmless. As for the first cause of action taken against Employee, the AJ analyzed the policy agreement between Agency and MPD regarding the use of MPD's Evidence.com system. He noted that the policy indicated that "any viewing of a video accessed from the website Evidence.com must only be in the course of handling an OPC complaint." The AJ held that because Employee did not provide his attorney with body-worn camera video and because Agency's policy was silent on audit trail reports from Evidence.com, Employee did not violate the policy. Similarly, the AJ found that Employee did not violate Agency's policy regarding distributing emails and concluded that Agency failed to prove that Employee was guilty of prejudicial conduct. As it relates to the administrative leave issue, the AJ held that Agency did not produce evidence to contradict Employee's testimony that he used his free time to work on his defense. As for the charges incurred for Agency's transcript, the AJ found that because Agency did not specify this allegation in its notice to Employee, it could not be used against him. Accordingly, the AJ reversed Agency's termination action and ordered that Employee be reinstated with back pay and benefits.

The case was subsequently appealed to the Superior Court of the District of Columbia. The Court issued a decision on June 21, 2021. It found that for charge one, the AJ did not fully address the issue of Employee accessing Evidence.com. Additionally, it did not agree with the AJ's conclusion that Employee was not charged with wrongfully accessing the website. Thus, because a discrepancy

existed between the record and the AJ's ruling, the Court remanded this issue for further review by the AJ.

As for charge two, the Court noted that Agency cited to DPM § 1607.2(a)(4) in its charge against Employee. However, it found that the AJ's analysis was based on Agency's policy instead of an analysis of the DPM. The Court concluded that the AJ only addressed whether the policy prohibited unauthorized disclosure of the documents, but he should have determined if Employee reasonably should have known that his conduct was a violation of law or whether the disclosure constituted an unauthorized disclosure of protected information, pursuant to DPM § 1607.2(a)(10). Accordingly, this issue was also remanded to OEA for further consideration.

Regarding charge three, the Court affirmed OEA's determination that Agency failed to prove the charge. The Court found that Agency did not offer evidence to dispute Employee's testimony that he used his work breaks to generate the documents or order the transcript. As for the final charge that Employee shared confidential documents, the Court again found that the AJ's analysis should have considered the DPM and not Agency's policy. Therefore, the fourth charge was remanded for further consideration.

On remand, the parties submitted several briefs. After consideration of those briefs, the AJ issued his Initial Decision on Remand on January 14, 2022. Because the Superior Court judge affirmed the AJ's ruling on charge three, the AJ only had to consider charges one, two, and four on remand. For charge one, as the AJ opined in his Initial Decision, he held that because Employee did not provide his attorney with body-worn camera video and because Agency's policy was silent on audit trail reports from Evidence.com, Employee did not violate the policy. However, he did find that Employee was insubordinate because he was aware that access of the Evidence.com website for anything other than handling an Agency complaint, required written permission from a supervisor. The AJ was not persuaded by Employee's contention that requesting permission would have been futile. He held that Employee understood the policy but chose not to follow it. Therefore, because the penalty for the first offense of this charge included removal, the AJ upheld Agency's removal action.

On February 18, 2022, Employee filed a Petition for Review with the OEA Board. He argues that charge one was not proven; however, even if the Board found that it was, the removal action should be reversed because Agency failed to consider mitigating factors. Employee asserts that his actions were reasonable and within the standard of care established by Agency's trainings, practice, and written policy. He argues that although he was alleged to have violated the section related to obtaining a supervisor's written permission, this language appears under the heading "accessing and viewing videos on Evidence.com." Therefore, the policy's prohibition was based on assessing and viewing the videos and not audit trail or user information. He further contends that with the exception of video footage, there is no language in the policy that prohibits accessing any user data accessible from the system. Additionally, Employee contests the AJ's credibility determinations related to his testimony and that of his witness. Finally, he argues that Agency did not properly consider the *Douglas* factors. As a result, Employee requests that the Board reverse the AJ's ruling on charge one and the penalty of removal.

On April 1, 2022, Agency filed its Reply to Employee's Petition for Review. It argues that Employee failed or refused to follow instructions and violated the policy when he accessed Evidence.com for unofficial purposes. Agency contends that Employee was aware of its policy; he signed a log pledging his adherence to the policy; and after working in his capacity for two years, he understood how Evidence.com was to be utilized. According to Agency, access for any unofficial purpose required written approval by a supervisor. Because Employee accessed Evidence.com to retrieve the audit trails for an unofficial purpose and without approval, Agency opines that he failed to comply with its written procedures in violation of 6B DCMR §

1607.2(d)(1). Agency asserts that removal was within the range of penalties, and it considered the *Douglas* factors when arriving at its penalty. Therefore, it requests that Employee's removal be upheld.

2. Employee v. Department of Public Works, OEA Matter No. 1601-0009-20 – The AJ issued an Initial Decision on November 16, 2021. As it related to the charges of conduct that an employee should reasonably know is a violation of law and assaulting/fighting while on duty, the AJ concluded that Agency established the requisite cause to discipline Employee. He explained that the interaction between Employee and the citizen was captured on surveillance footage. According to the AJ, the testimonial evidence and video footage depicted a confrontation between Employee and the citizen wherein Employee shoved/pushed the citizen in his back, causing him to bend forward. The AJ disagreed with Employee's self-defense argument, noting that neither the citizen's elbow nor chest made physical contact with Employee's person during the incident. As such, he opined that these charges were supported by the record.

Concerning the remaining charges of misrepresentation, making an incorrect entry on an official record, and reporting false or misleading material information, the AJ held that Agency met its burden of proof in establishing each cause of action against Employee. He provided that following the May 17, 2019, incident, Employee filed a police report with the Metropolitan Police Department, an internal incident report with Agency, and a statement to the Office of Risk Management regarding a workers' compensation claim. According to the AJ, Employee failed to indicate that she shoved or pushed the citizen during the altercation on any of the aforementioned documents. He concluded that Employee provided conflicting testimony during the evidentiary hearing because Employee testified on direct examination that she pushed the citizen after he pushed her, then denied on cross-examination that she never shoved him. Thus, the AJ reasoned that Employee submitted false statements to the police department, Agency, and ORM by knowingly providing untrue information – that Employee did not assault the citizen during the May 17th altercation – in the three reports that directly contradicted the video and witness accounts.

Lastly, the AJ held that Employee's retaliation claims were not supported by the record. He provided that there was no causal connection between Employee's harassment claim and her assault on a citizen while on duty. Since termination was a permissible penalty for the first offense for each charge levied against Employee, the AJ concluded that Agency did not abuse its discretion in initiating its termination action. Therefore, Employee's termination was upheld.

Employee filed a Petition for Review with the OEA Board on December 20, 2021. She argues that the Initial Decision should be reversed because the AJ admitted unreliable and prejudicial hearsay evidence; the AJ failed to make proper credibility determinations and findings on material facts; Agency was erroneously permitted to impeach Employee's testimony with a tape recording of her workers' compensation claim; and the AJ failed to address material issues about the probative value of the video depicting the May 17th incident. Additionally, she contends that the AJ improperly allowed Agency to impeach Employee with a pre-hearing conference statement. Further, Employee avers that the AJ erred in concluding that Agency met its burden of proof in establishing that she was guilty of the charges against her. Consequently, she requests that the Initial Decision be reversed and that her Petition for Review be granted.

Agency filed its response on January 24, 2022. It maintains that the AJ did not admit unreliable or prejudicial hearsay evidence during the evidentiary hearing. Agency believes that the AJ made the proper credibility determinations and that he did not err in permitting Employee to be impeached with a recorded statement from ORM. Additionally, it argues that the Initial Decision adequately addressed material issues pertinent to the probative value of the surveillance video depicting the altercation. According to Agency, Employee could be impeached by her prehearing conference statement because her testimony during the evidentiary hearing directly contradicted the

representations made in the document. It further asserts that the AJ correctly considered all evidence that Employee's termination was retaliatory. Lastly, Agency opines that it properly met its burden of proof in establishing the charges against Employee. Therefore, it requests that Employee's Petition for Review be denied.

3. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0036-19

– The AJ issued an Initial Decision on February 3, 2022. Regarding the AWOL charge, she held that it was undisputed that Employee failed to report to work on the five dates cited by Agency. However, the AJ gleaned that the issue was whether Agency was aware of Employee's medical condition and her inability to report to work during this time. According to the AJ, Agency had ample documentation and information regarding Employee's medical incapacity well before November 28, 2018, when it issued the Advance Written Notice of Removal. Specifically, on August 31, 2019, Employee responded to Agency's directive to notify it no later than August 31, 2018, of her intention to return to work or risk disciplinary action. Additionally, the AJ determined that Agency received medical reports regarding Employee's medical incapacity and inability to return to work from her treating physician, Dr. Tansinda, who noted that Employee's anticipated return-to-work date was February 19, 2019. Moreover, citing to the holding in *Murchison v. Department of Public Works*, the AJ provided that an AWOL charge may also be reversed if an employee presents sufficient evidence of illness or disability at the time covered by the AWOL charge. Since Employee presented documentary and testimonial evidence supporting her medical incapacitation during the forty-hour period for which she was charged, the AJ held that Agency failed to meet its burden of proof in establishing that Employee was AWOL during the relevant time period.

With respect to the charge of "inability to carry out assigned responsibilities," the AJ provided that it was undisputed that at the time Agency proposed removal, Employee could not meet the physical requirements of the YDR position. She reasoned that it was essential for all YDRs, even those assigned to non-contact duties, to meet all physical requirements since they must respond to emergencies which require the use of physical force to ensure the safety of CIY and Agency staff. As a result, the AJ concluded that Agency met its burden of proof that Employee was unable to carry out her assigned duties at the time of proposed removal.

Concerning the penalty, the AJ highlighted the holding in *Lovato v. Department of the Air Force*, which provided that an agency's selection of a penalty cannot be disturbed if the agency weighed relevant factors in a fair and unbiased manner. According to the AJ, Employee's termination was based on two separate charges; however, Agency did not argue or present evidence that it would have proposed removal solely based on Employee's inability to perform her duties as a YDR. She explained that both the proposing and deciding officials only referred to the AWOL charge to support Agency's selection of the penalty. Since the AWOL charge was reversed, the AJ concluded that the matter must be remanded to Agency to determine what penalty, if any, is appropriate based on the remaining charge (inability to carry out assigned duties).

As an alternative basis for remanding the matter to Agency, the AJ relied on the holding in *Roebuck v. D.C. Office of Aging*, wherein the District of Columbia Court of Appeals held that in selecting a penalty, an agency must perform an assessment of the *Douglas* factors and decide if a fact mitigated and could reduce the penalty, point in a different direction, or was neutral, or inapplicable. The Court went on to state that OEA was tasked with reviewing the quality and scope used by the agency to determine the penalty, and if it determined that the process did not meet the required standards, to remand the matter to the agency with specific information to enable it to meet those standards on remand. After reviewing the process used in determining the penalty, the AJ concluded that Agency failed to conscientiously consider significant mitigating factors which may have led it to impose a less severe penalty than Employee's removal. Citing to Chapter 20B of the

District Personnel Manual, the AJ stated that Agency should have considered the multiple injuries sustained in the performance of Employee's duties, her citations for reliability, job performance, and specific acts of courage. In sum, the AJ held that Agency failed to meet its burden of proof regarding the AWOL charge; therefore, the charge was reversed. Therefore, she instructed that the matter be remanded to Agency with directions to propose a penalty, if any, based on the inability to perform duties charge because Agency failed to consider all relevant factors when it selected the penalty of termination. Agency was further directed to immediately restore Employee to LWOP status retroactive to August 19, 2019; restore any benefits to which she was entitled; and submit documentation to the AJ of its compliance within thirty calendar days of the date of issuance of the Initial Decision.

Agency disagreed and filed a Petition for Review with the OEA Board on March 10, 2022. It asserts that the AJ properly determined that Employee was unable to carry out her assigned duties; therefore, she should have left the removal action undisturbed. Additionally, it posits that OEA lacks jurisdiction to review whether Agency engaged in disability discrimination, namely whether Employee should have been offered a vacant position as a reasonable accommodation. Alternatively, it opines that even if this Office has jurisdiction to consider whether Employee should have been offered a vacant position, it should not disturb the removal action because the evidence does not show that there was a vacancy. Agency also submits that the AJ was not permitted to grant interim relief – restoration of Employee's LWOP status and benefits – before the Initial Decision becomes final. Further, it disagrees with the AJ's supposition that 6-B, Section 2006.2 of the D.C. Municipal Regulations should have been utilized prior to removing Employee because the section cited in the Initial Decision did not become effective until May 10, 2019, months after the occurrence of the instant personnel action. Lastly, Agency believes that this Office lacks jurisdiction to make findings related to worker's compensation claims. Therefore, it asks this Board to reverse the Initial Decision and uphold its removal action.

In response, Employee asserts that Agency's petition should be denied because it fails to meet the applicable standards for review as matter of law; Agency has mischaracterized the facts and decisions of the AJ; and Agency's arguments constitute mere disagreements with the AJ's findings. Employee reiterates that she was terminated while she was on short-term disability and that she was under the continued care of a physician during the relevant time period. She also highlights her performance evaluations and service accomplishments during her tenure. Employee believes that Agency unjustly discriminated against her; therefore, she asks that her termination be reversed.

- 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.”