

**DISTRICT OF COLUMBIA  
OFFICE OF EMPLOYEE APPEALS**

**NOTICE OF PUBLIC MEETING**

The District of Columbia Office of Employee Appeals will hold a meeting on February 4, 2021, at 11:00 a.m. Considering the public health crisis, 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=e83d028849a51f8532f1d311deb34c1f](https://dcnet.webex.com/dcnet/onstage/g.php?MTID=e83d028849a51f8532f1d311deb34c1f3)

3. You can also dial 173.243.2.68 and enter your meeting number.

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: 180 621 8441

Questions about the meeting may be directed to [wynter.clarke@dc.gov](mailto:wynter.clarke@dc.gov).

**Agenda**

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

Thursday, February 4, 2021 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. Sylvia Johnson v. D.C. Fire and Emergency Medical Services, OEA Matter No. J-0145-15R17R20**

— This matter was previously before the Board. After considering the parties' arguments, the AJ issued his Initial Decision on February 11, 2016. He found that Employee was hired under a term appointment by Agency on July 20, 2009. According to the AJ, Employee's term appointment was extended on September 22, 2011 and July 20, 2013. However, on March 30, 2014, at the expiration of her term, Employee was

terminated from her position. The AJ held that Employee was subsequently rehired on September 22, 2014, as a probational Career Service employee. He found that the record did not support Employee's contention that she previously held a Career Service position and completed a probationary period. He reiterated that Employee held a term appointment that was extended on several occasions, but she was not a Career Service employee. Finally, he provided that because there was a break in service and pursuant to the District Personnel Regulation ("DPR") § 813, Employee was required to serve a one-year probationary period. Thus, the AJ ruled that OEA lacked jurisdiction and dismissed Employee's appeal.

On March 17, 2016, Employee filed a Petition for Review of the Initial Decision with the OEA Board. Subsequently, Agency filed its response to Employee's Petition for Review. On June 6, 2017, the OEA Board issued its Opinion and Order on Petition for Review. It remanded the matter to the Administrative Judge for further consideration because it could not determine if the requirements of DPR § 823 were met because of missing documents from the record. As for Employee's probational period, the Board found that the August 22, 2014 Standard Form 50 ("SF-50") clearly provided the term "probational." However, it noted that it was not clear that Employee was actually required to serve a second probationary period if the requirements of DPR § 823 were met, or if she served for four years or more continuously as a term employee. Accordingly, the Board provided that the Administrative Judge should also adequately consider DPR § 823.10 because if the AJ concluded that Employee was converted to a Career Service, permanent appointment, then Employee may have already served her one-year probationary period with her initial term appointment.

On December 12, 2017, the AJ issued his Initial Decision on Remand. He found that Employee's position was acquired through open competition. The AJ relied on the "competitive service" notation in box 34 of Employee's July 20, 2009 SF-50. Moreover, the AJ determined that Employee's term appointment was continuously served for more than four years. Thus, in accordance with DPR § 823.2, when an employee is in a position not supported by grant funds; the position was acquired through open competition; and the employee continuously served in a term position for four years – the Agency then had two options. It could either separate Employee from the District government or convert her appointment to a regular Career Service appointment with permanent status. The AJ found that Agency did not separate Employee from service in July of 2013. Therefore, her position was required to be converted to a regular Career Service appointment with permanent status. Furthermore, the AJ found that Employee's September 22, 2014 SF-50 confirmed that she was reinstated to a Career Service permanent position upon her rehire. The AJ held that pursuant to DPR § 1603.2, because Employee was a permanent Career Service employee, an adverse action could only have been taken for cause. He ruled that Agency did not properly impose an adverse action against Employee; therefore, her termination was reversed.

Thereafter, the matter was appealed to the Superior Court for the District of Columbia. On April 2, 2020, the Superior Court Judge issued his decision. The Court held that the AJ incorrectly relied on the 2014 version of District Personnel Manual ("DPM") § 823 in rendering his decision. It found that the 2000 version of the regulation was in effect at the time the issues arose related to Employee's term appointment. Therefore, it remanded the matter to the AJ for consideration of the 2000 version of the DPM. The Court did determine that the AJ's ruling that Employee's initial term appointment in July 2009 was obtained through open competition, was based on substantial evidence. Therefore, it did not disturb the AJ's ruling on this issue.

On October 8, 2020, the AJ issued his Second Initial Decision on Remand from Superior Court of the District of Columbia. He held that although the 2000 and 2014 versions of DPM § 823.1 are identical, the two versions of DPM § 823.2 are not. The AJ opined that the two options found in the 2014 version of DPM § 823.2 were not found in the 2000 version. He reasoned that Employee failed to cite to any rule or regulation requiring approval from the personnel authority for each subsequent extension of a term appointment beyond four years. Therefore, the AJ ruled that because Agency was granted authority to extend Employee's term beyond four continuous years, Employee was never converted to Career Service status in 2013 when the term appointments exceeded the four years. Accordingly, the AJ held that Employee

was required to serve a probationary period when she was rehired in September of 2014. Because Employee was within her probationary period when she was terminated, the AJ concluded that OEA lacked jurisdiction to consider her appeal. As a result, the matter was dismissed for lack of jurisdiction.

Employee filed a Petition for Review with the OEA Board on November 16, 2020. She argues that throughout the appeal, Agency withheld personnel documents. It is her position that the record does not include all of the pages of the Request for Superior Qualification/Exceptions form. Moreover, Employee asserts that Agency offered no supporting documentation or written justification for the form. Furthermore, Employee questions the authenticity of the July 20, 2013 and January 20, 2014 SF-50s because both were signed by the Director of DCHR, who was not appointed by Mayor Bowser until August 3, 2015. She, again, contends that Agency did not have prior approval from the personnel authority to extend her term from January through March 2014. Employee, thus, claims that her position was converted to Career Service during the unapproved extension. Hence, she requests that her Petition for Review be granted and that she be reinstated with back pay.

On December 22, 2020, Agency filed its response to Employee's Petition for Review. It asserts that the record established that it was authorized to extend Employee's term appointment beyond four years and that her arguments regarding a second approval lacks merit. As for the complete nature of the Exceptions form, Agency argues that the AJ based his finding on the document itself; therefore, Employee's position was unsupported by the record. Agency agreed with the AJ's finding that OEA lacked jurisdiction to consider Employee's appeal because she was terminated during her probationary period. Therefore, it requested that Employee's Petition for Review be denied.

**2. Andrew Johnson v. D.C. Public Schools, OEA Matter No. 1601-0215-11R18R20** — This matter was previously before the Board. The OEA Administrative Judge issued an Initial Decision on May 20, 2014, dismissing Employee's appeal for lack of jurisdiction. The matter was appealed to the OEA Board on June 26, 2014, and on February 16, 2016, Employee's Petition for Review was denied. Employee subsequently filed an appeal with the Superior Court for the District of Columbia. The Court denied his petition and upheld the Board's ruling. Thereafter, Employee appealed the Superior Court's ruling to the District of Columbia Court of Appeals. In its August 9, 2018 order, the Court vacated the Initial Decision on the matter of jurisdiction. Consequently, the case was remanded to OEA for consideration on the merits of Employee's case.

The AJ issued an Initial Decision on Remand on June 14, 2019. He held that Agency's termination action under the IMPACT system was taken in accordance with all applicable rules, laws, and regulations. Employee then filed a second Petition for Review with the OEA Board. On May 19, 2020, the Board issued an Opinion and Order on Remand. It disagreed with Employee's argument regarding the legality of Agency's IMPACT system, finding that the promulgation of the District of Columbia Omnibus Authorization Act, P.L. 109-356, and the enactment of D.C. Code § 1-617.18, authorized Agency to implement its own process for evaluating employees. Regarding the AJ's findings related to Employee's IMPACT score and the IMPACT process, the Board concluded that the Initial Decision on Remand was not based on substantial evidence because Employee raised genuine issues of material facts which could not be decided on the record alone. Therefore, the matter was remanded to the AJ for the purpose of conducting an evidentiary hearing. A hearing was subsequently held on July 23, 2020, wherein the parties presented documentary and testimonial evidence in support of their positions.

On October 15, 2020, the AJ issued a Second Initial Decision on Remand. As it related to Employee's argument that the IMPACT process was changed during the 2009-2010 school year, the AJ held that Agency committed a harmful error by failing to evaluate Group 12 psychologists in accordance with the IMPACT Guidebook that was distributed to employees at the start of the school year. The AJ explained that the Guidebook stated that the Related Service Providers ("RSP") component was supposed to comprise 70% of an employee's IMPACT score. Both the Assessment Timeliness ("AT") and Individual Education Plan Quality ("IEPQ") components were weighted at 15%. However, because the IMPACT scoring rubric

was changed during the middle of the 2009-2010 grading cycle, with the RSP weight increasing from 70% to 100%, and both the AT and IEPQ weights decreasing from 15% to 0%, the AJ opined that Agency committed a harmful error under Chapter 6-B, Section 631.3 of the D.C. Municipal Regulations. Additionally, he opined that, by failing to score the AT and IEPQ components, Group 12 psychologists were prejudiced because of the time and resources allocated to meet the remaining two IMPACT standards that were ultimately thrown out.

Regarding Employee's argument that Agency gave him an erroneous AT score, the AJ reasoned that Chapter 5-E, Sections 1306.4 and 1306.5, gave Agency considerable latitude in evaluating its personnel. Based on the documentary and testimonial evidence provided at the evidentiary hearing, he concluded that Employee was untimely in submitting assessments for two students during the 2010-2011 school year. Consequently, the AJ held that Agency was justified in awarding Employee a score of "1" for the AT component. Concerning Employee's argument that he was erroneously evaluated on the use of the Berry Visual Motor Integration Test, the AJ agreed with Agency's position that Employee was not, in fact, evaluated on visual motor integration during the 2010-2011 school year. Lastly, contrary to Employee's position, the AJ provided that Agency calculated his AT score before, not after, issuing its notice of separation. Notwithstanding, because Agency committed a harmful procedural error by changing its IMPACT grading standards during the 2009-2010 school year, the AJ decided that Employee's removal was improper. As a result, Agency's termination action was reversed, and Employee was ordered to be reinstated with back pay and benefits.

Agency disagreed with the AJ's ruling and filed a Petition for Review with the OEA Board on November 16, 2020. It argues that the Second Initial Decision on Remand is not supported by substantial evidence and that the AJ's findings are based on an erroneous interpretation of law. Specifically, Agency contends that the AJ failed to conclude that the procedural error in the IMPACT grading rubric actually had an effect on Employee's final score. Rather, it opines that the AJ merely speculated that the change *may* have had an effect on Employee's score (emphasis added). Additionally, Agency asserts that Employee would have received an IMPACT score of "Minimally Effective" despite the changes to the grading standards. As such, it requests that the Board grant its Petition for Review and reverse the Second Initial Decision on Remand.

Employee filed a response to Agency's petition on November 25, 2020. He disagrees with the AJ's finding that he submitted two student assessments in an untimely manner, which resulted in an AT score of "1." Employee also takes issue with Dr. Mitchell's testimony regarding her use of the term "woefully ineffective" as it relates to his performance during the 2009-2010 school year. Moreover, he asserts that the AJ erred in concluding that Agency calculated his AT score prior to issuing its termination notice. Employee also disputes several of the AJ's substantive findings in the Second Initial Decision on Remand

- 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