

**DISTRICT OF COLUMBIA  
OFFICE OF EMPLOYEE APPEALS**

**NOTICE OF PUBLIC MEETING**

The District of Columbia Office of Employee Appeals will hold a meeting on January 19, 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/onstage/g.php?MTID=e68a3a5a1fdf81bbfe45c3ee19e3caeda>

Event password: board

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.

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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, January 19, 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. D.C. Public Schools, OEA Matter No. 1601-0024-22** – Employee previously worked as a teacher for D.C. Public Schools ("Agency" or "DCPS"). In May of 2021, as the result of a settlement agreement with Agency, Employee was notified that he would be reinstated and assigned to Anacostia High School at the start of the 2021-2022 school year. On September 7, 2021, Agency issued a Notice of Pending Investigation alleging that Employee improperly maintained dual employment as a teacher with DCPS and Prince George's County, Maryland Public Schools ("PGCPS"); worked overlapping hours; and received dual compensation. Specifically, Employee was charged with violation of D.C. Municipal Regulation ("DCMR"), Title 5, Sections 1401.2(b) and 1401.2(i) for grave misconduct and dishonesty. On October 15, 2021, Agency issued a Final Notice of Termination, sustaining the charges against Employee.

The effective date of his termination was November 1, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on November 29, 2021. He argued that Agency erred in concluding that he was an employee of DCPS at the time of his termination. Employee asserted that he never signed an offer letter; reported to work at Anacostia High School; or received compensation for employment from Agency. As a result, he requested damages for wrongful termination, defamation of character, and an opportunity to fulfill the terms of his previous settlement agreement since he alleged that Agency did not adhere to the terms.

Agency filed its answer on January 12, 2022. It stated that the settlement agreement with Employee stipulated that he would be reinstated as a teacher for a twelve-month period. Agency noted that Employee admitted to attending virtual professional development sessions for DCPS and communicated with his supervisors, the Director of Labor Management and Employee Relations, and the DCPS administrative team from August 20, 2021, until September 10, 2021. According to Agency, Employee was terminated after it confirmed that he had been employed as a mentor teacher with PGCPs. Since Employee was simultaneously and improperly receiving compensation from two school districts, Agency reasoned that his actions amounted to grave misconduct and dishonesty, which warranted termination. Alternatively, Agency suggested that if Employee was not in fact an employee of DCPS during the relevant time, OEA lacked jurisdiction over his appeal.

An OEA Administrative Judge (“AJ”) was assigned to the matter in January of 2022. During a March 9, 2022, prehearing conference, the AJ concluded that jurisdiction was not established and ordered the parties to submit briefs addressing the issue. On April 28, 2022, the AJ issued an Order on Jurisdiction. Based on the parties' submissions, she held that OEA retained jurisdiction over Employee’s appeal because he was employed by DCPS at the relevant time. In support thereof, the AJ highlighted an email communication from the Director of the Office of Pay and Retirement Services (“OPRS”), Temony McNeil, which reflected that there were four payments remitted to Employee between August and November of 2021 for time worked, bereavement leave, sick leave, and summer pay credit. The AJ further noted that Employee made leave requests via an official DCPS email address. Therefore, she concluded that this Office was permitted to adjudicate Employee’s appeal because he was an employee of Agency at the time it initiated the termination action.

After jurisdiction was established, the AJ ordered the parties to submit written briefs to address whether Agency had cause to terminate Employee. In its brief, Agency argued that Employee’s termination was proper because his conduct violated Title 5, Sections 1401.2(b) and 1401.2(i) of the DCMR. It reiterated that Employee improperly worked for two, separate government employers while receiving compensation for overlapping hours. Agency acknowledged that Employee was reinstated during the COVID-19 Public Health Emergency (“PHE”), which required virtual teaching in many cases but reasoned that he began earning a salary effective August 17, 2021. According to Agency, Employee submitted several leave requests to DCPS for bereavement and COVID-19-related reasons. Because Employee maintained dual employment with DCPS and PGCPs, Agency reasoned that it established cause to terminate Employee because his conduct constituted fraud and manipulation of taxpayer dollars, which was an affront to public policy. Consequently, it opined that Employee’s termination was proper.

In his brief, Employee reiterated that he was not an employee of Agency because he never received payment from DCPS; never signed an offer letter; never reported to work;

and never performed any job function during the time Agency alleged that he was employed by DCPS. Additionally, Employee argued that Agency's actions over the course of the appeal process resulted in personal and professional harm against him because the charges were false in nature. To support his position, Employee cited to a conditional offer letter which stated that he was not permitted to report to work at his DCPS location until he received and accepted an official offer letter. Employee further claimed that counsel for Agency was sharing false information about him. Therefore, Employee believed that Agency's adverse action was unwarranted.

The AJ issued an Initial Decision on August 23, 2022. She reiterated her previous rationale for finding that Employee was officially employed by DCPS between August of 2021 and September of 2021. The AJ explained that D.C. Code §1603.01(7) defines an employee as "...an individual who performs a function of the District government and who receives compensation for the performance of such services." The AJ disagreed with Employee's argument that he was not an employee of DCPS at the time of his termination, noting that by his own admission, Agency issued him two pay checks on September 10, 2021, and September 24, 2021. Additionally, she cited to a July 13, 2021, assignment letter which was signed by Employee. The letter stated that Employee was being assigned to Anacostia High School as of July 19, 2021, and that the twelve-month assignment would expire on July 15, 2022. Further, in establishing employment with Agency, the AJ relied on several written communications between Employee and OPRS related to the wages that were reported on his W2 for the 2021 tax year.

Regarding the substantive charges of grave misconduct and dishonesty, the AJ highlighted affidavits from representatives at PGCPs to establish that Employee received compensation from two school districts in September of 2021. According to the AJ, Employee was serving in a full-time position, with a Monday through Friday work schedule at PGCPs. Further, the record revealed emails which included copies of Employee's attendance records at DCPS during the 2021-2022 school year; emails with DCPS personnel; and copies of Employee's leave requests. After reviewing the parties' submissions, the AJ concluded that Employee was simultaneously employed by both DCPS and PGCPs, in violation of DCMR Section 1401.2(b) and DCMR Section 1402(i). Therefore, she held that Agency's adverse action was supported by cause.

As for the penalty of removal, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985), wherein the Court of Appeals held that OEA is tasked with determining whether the penalty was in the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency. In her analysis, the AJ acknowledged that Agency considered the relevant *Douglas* factors as well as three, similar previous disciplinary actions. After reviewing the record, she concluded that Agency properly exercised its managerial discretion in selecting the appropriate penalty. Therefore, Agency's termination action was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on September 26, 2022. He argues that the penalty of termination was inappropriate and submits that he has identified new and material supporting case law in support his petition. Employee maintains that he never signed an official employment contract with Agency and asserts that he never performed paid functions for DCPS. According to Employee, Agency never compensated by him for working as a teacher. Additionally, Employee opines that Agency's initiation of the termination action was a harmful and damaging experience. Therefore, he requests that this Board grant his Petition for Review.

Employee subsequently filed an Addendum to Petition for Review on October 20, 2022. In his filing, Employee highlights the holding in *Employee v. D.C. Public Schools*, OEA Matter No. J-0010-12 (March 5, 2012), to support his argument that OEA does not retain jurisdiction over his appeal. He reiterates his previous contention that he was never employed by Agency; therefore, this Office erred in concluding that it was permitted to adjudicate the instant appeal. As such, he again requests that his Petition for Review be granted.

2. **Employee v. D.C. Fire & Emergency Services, OEA Matter No. 1601-0046-21** – Employee worked as a Firefighter/Emergency Medical Technician (“FF/EMT”) and an Assisting Crew Member Aide (“ACA”) with the Department of Fire and Emergency Services (“Agency”). On August 7, 2020, Agency issued a Proposed Notice of Adverse Action, charging Employee with violation of the D.C. Fire & Emergency Services Order Book, Article XXIV, Section 10, Section 11 of the Patient Bill of Rights, and Special Order No. 54, Series 2012. Agency’s first charge levied against Employee alleged that he neglected his duty and unreasonably failed to aid a member of the public during an emergency call. The second charge was that he violated the Pre-Hospital Treatment Protocols by neglecting his duty to properly document the Electronic Patient Care Report (“ePCR”) for the incident.

On July 1, 2021, Agency’s Fire Trial Board held an administrative hearing on the charges against Employee. Employee pleaded not guilty as to Charge No. 1, Specification No. 1 and guilty as to Charge No. 2, Specification No. 1. After eliciting the documentary and testimonial evidence, the Trial Board found Employee guilty of both charges and recommended the penalty of a 720-hour suspension for Charge No. 1, Specification No. 1, and a twenty-four-hour suspension for Charge No. 2, Specification No. 1. On August 17, 2021, Agency’s Chief issued a Final Agency Decision accepting the Trial Board’s recommendations. Employee’s suspensions became effective on August 23, 2021.

An Initial Decision was issued on September 7, 2022. Concerning Charge No 1., Specification No. 1, the AJ held that the Trial Board met its burden of proof in establishing that Employee both neglected his duty as a FF/EMT and unreasonably failed to provide assistance to the public during the May 22<sup>nd</sup> emergency call. She explained that Employee did not dispute that he and his partner did not follow the proper patient care protocol in their interaction with the 6-year-old patient and his mother during the service call. Further, the AJ stated that Employee admitted to not having any contact with the patient prior to departing the scene. She noted that Employee admitted to being unsatisfied with his performance during the call and that he admitted that he could have performed his duties better in hindsight.

As it related to Charge No. 2, Specification No. 1, the AJ agreed with Agency that despite clear directives outlined in the Pre-hospital Treatment Protocols, the Consent/Refusal of Care Policy, as well as the Special Order No. 54, Series 2012, Employee and his partner failed to perform any assessment of their patient; failed to follow the Department’s Refusal of Care policy; and failed to properly complete an ePCR with the corresponding incident report. The AJ further acknowledged that Employee pleaded guilty to this charge and specification during the Trial Board Hearing. As a result, she held that Charge No. 2 was supported by substantial evidence.

However, the AJ concluded that Agency utilized the incorrect version of the District Personnel Manual (“DPM”) in instituting its adverse action. Concerning the neglect of duty cause of action, she explained that the applicable DPM version went into effect in the District on May 12, 2017. Therefore, Employee’s suspension, which commenced

after the effective date was subject to the new version of the DPM. The AJ went on to provide that a specification of neglect of duty under the 2012 version and the current version of the DPM, while encapsulated in different subsections, did not substantively differ because the specification was captured in both versions of the DPM. Since both versions provide for a maximum penalty of termination, the AJ held that Agency's error was harmless.

Unlike neglect of duty, the AJ determined that a specification of unreasonable failure to give assistance to the public under the 2012 version of the DPM did not have a corresponding provision in the current version. She noted that the substantive changes in the DPM and the corresponding penalties rendered her unable to decipher which specification should have been levied against Employee had Agency utilized the appropriate version of the DPM. As a result, the AJ dismissed the specification because Agency committed a harmful procedural error.

- 3. Employee v. D.C. Fire & Emergency Services, OEA Matter No. 1601-0040-21** – Employee worked as a Firefighter/Emergency Medical Technician (“FF/EMT”) with the Department of Fire and Emergency Services (“Agency”). On August 7, 2020, Agency issued a Proposed Notice of Adverse Action, charging Employee with violation of the D.C. Fire & Emergency Services Order Book, Article XXIV, Section 10, Section 11 of the Patient Bill of Rights, and Special Order No. 54, Series 2012. The first charge alleged that Employee neglected her duties as a FF/EMT and unreasonably failed to aid a member of the public during an emergency call. The second charge asserted that she violated the Pre-Hospital Treatment Protocols by failing to properly document the Electronic Patient Care Report (“ePCR”) for the incident.

On June 7, 2021, Agency's Fire Trial Board held an administrative hearing. She pleaded not guilty as to Charge No. 1, Specification No. 1 and guilty as to Charge No. 2, Specification No. 1. After eliciting the documentary and testimonial evidence, the Trial Board found Employee guilty of both charges and recommended the penalty of termination for Charge No. 1 and a seventy-two-hour suspension for Charge No. 2. On July 28, 2021, Agency's Chief issued a Final Agency Decision accepting the Trial Board's recommendations. Her termination became effective on July 31, 2021.

An Initial Decision was issued on September 7, 2022. Concerning Charge No 1., Specification No. 1, the AJ held that the Trial Board met its burden of proof in establishing that the charge was supported by substantial evidence. According to the AJ, Employee did not dispute that she failed to follow the proper patient care protocol in her interaction with the 6-year-old patient and his mother, in violation of the Patient Bill of Rights. Employee admitted during the Trial Board Hearing to not having any contact with the patient prior to leaving the scene. As it related to Charge No. 2, Specification No. 1, the AJ acknowledged that Employee pleaded guilty to this charge and specification during the Trial Board Hearing. As a result, she held that Charge No. 2 was supported by substantial evidence.

However, the AJ concluded that Agency utilized the incorrect version of the District Personnel Manual (“DPM”) in instituting its adverse action. Concerning the neglect of duty cause of action, she explained that the applicable DPM version went into effect in the District on May 12, 2017. Therefore, Agency's adverse action, which commenced after the effective date, was subject to the new version of the DPM. The AJ went on to provide that a specification of neglect of duty under the 2012 version and the 2017 version of the DPM, while encapsulated in different subsections, did not substantively differ because the specification was captured in both versions of the DPM. Since both

versions provide for a maximum penalty of termination, the AJ held that Agency's error was harmless.

Unlike neglect of duty, the AJ determined that a cause of unreasonable failure to give assistance to the public under the 2012 version of the DPM did not have a corresponding provision in the May 12, 2017, or subsequent versions of the DPM. Thus, she held that Agency's failure to follow the appropriate laws, rules, and regulations constituted a harmful procedural error because Agency did not provide a breakdown of the penalty with respect to each cause of action or specification under Charge 1 No. 1. Accordingly, the AJ concluded that it would be improper to essentially 'guess' or 'estimate' what the appropriate charge and/or penalty would have been had Agency used the appropriate DPM version. As a result, the AJ dismissed Charge No. 1 because Agency committed a harmful procedural error.

Next, the AJ assessed whether Agency violated Article 31, Section B (5) of the CBA, which states that "...[t]he hearing shall begin within 180 days of the employee's receipt of the Initial Written Notification. When the employee requests a postponement or continuance of a scheduled hearing, the 180-day time limit shall automatically be extended by the length of the postponement or continuance granted by the Department." AJ identified that Employee received an initial notification of the charges on May 22, 2020, and the Trial Board Hearing began on June 7, 2021, after Employee, who was represented by counsel at the time, requested that the date be extended to June 7, 2021. According to the AJ, even if Agency violated the CBA, both the OEA Board and Courts have held that, where there is no specific consequence to an agency's violation of a time limit, the time limit is construed to be directory in nature. Although Article 31, Section B (5) provides a clear time limit for when to begin a Trial Board Hearing, it does not provide a consequence for failing to strictly adhere to this provision. Consequently, the AJ determined that the language of the CBA should be construed as directory, rather than mandatory in nature. She further determined that any violation of this section did not constitute a harmful procedural error.

Concerning whether Agency's adverse action was conducted in accordance with all applicable laws or regulations, the AJ provided that the neglect of duty specification includes failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; and sleeping or dozing on-duty or loafing while on duty. She noted that Employee admitted that her conduct on May 22, 2020, did not conform with the Patient Bill of Rights and proper patient care protocol. Employee also admitted that Ambulance 32 did not have a face-to-face contact with the patient, and they did not perform an assessment of the patient as required. Based on the record, the AJ held that Agency's decision to levy a charge of neglect of duty against Employee was done in accordance with applicable laws and regulations.

For the unreasonable failure to give assistance to the public charge, she held that Employee's failure to have face-to-face contact or evaluate the child/patient was not unreasonable given the COVID-19 Public Health Emergency. In further support of her conclusion, the AJ noted that the lack of proper guidance due to the novelty of the disease; the mother's concern for potential COVID exposure; and her refusal to have her son transported to the hospital with the ambulance, were factors which supported the conclusion that Agency lacked cause to charge Employee with this cause of action.

Finally, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), in assessing whether the imposed penalty was appropriate. Regarding Charge No. 2, Specification No. 1, Employee's guilty plea, in addition to a review of the record, led the AJ to conclude that the charge was supported by substantial evidence. Therefore, Agency's imposition of a seventy-two-hour suspension for neglect of duty was sustained. However, for Charge No. 1, Specification No. 1, the AJ concluded that Agency failed to utilize the appropriate version of the DPM in its administration of this action, and that Agency failed to provide a breakdown of the penalty with respect to each cause of action listed in the charge. Consequently, she held that the penalty of termination for Charge No. 1, Specification No.1 was inappropriate under the circumstances. Therefore, Agency's action of terminating Employee was reversed; Agency's action of suspending Employee for seventy-two hours was upheld; and Agency was ordered to reimburse Employee all pay and benefits lost a result of the termination.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 12, 2022. It asserts that the Initial Decision should be reversed because it was inappropriate to decide the case based on an issue that was not addressed by the parties; the issue on which relief was granted was waived by Employee; and Agency properly charged Employee using the applicable procedures. It contends that Agency was required to rely upon the Order Book and the 2012 DPM because the 2017 amendments would modify bargained-for procedures and notes that Impacts & Effects bargaining has not occurred between Agency and Employee's Union. Further, Agency opines that even if its reliance on the 2012 DPM constituted an error, it was harmless. Thus, it requests that the Petition for Review be granted.

- 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](mailto:opengovoffice@dc.gov).”