

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on March 2, 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=e29e22479622d6fc1eb21d4176dfd2c21>
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.

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, March 2, 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. Office of the Attorney General, OEA Matter No. 1601-0030-22** — Employee worked as a Support Services Specialist with the Office of the Attorney General ("Agency"). On November 16, 2021, Agency issued a final notice of separation removing Employee from her position effective on November 18, 2021. It charged Employee with non-resident fraud pursuant to District Personnel Manual ("DPM") §§ 1605.4(a) – conduct prejudicial to the District: unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive, or confidential information; 1605.4(b) – false statements: misrepresentation, falsification, or concealment of material facts or records in connection with an official matter; knowingly and willfully making an incorrect entry on an official record or approving an incorrect official record; and knowingly and willfully reporting false or

misleading information or purposefully omitting material facts, to any supervisor; and 1605.4(1) – prohibited personnel practices. Agency alleged that Employee made false statements about her address and residency and altered her paystubs to enroll her daughter at KIPP public charter school in the District of Columbia (“D.C.”) to avoid paying non-resident tuition.

On December 16, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). She explained that while she was a Maryland resident, her daughter resided with Employee’s grandmother and eldest daughter in D.C. Additionally, Employee contended that she did not intentionally commit fraud. She attested that she did not alter her paystubs to reflect that she was a D.C. resident, but the paystubs did reflect where her daughter resided. Employee opined that Agency “terminating [her] for changing the address on her paystubs was extreme.” As a result, she requested that the tuition fraud action be removed from her record.

Agency filed an Answer to the Petition for Appeal on February 4, 2022. As it related to the conduct prejudicial to the District charge, Agency argued that in accordance with 5-A District of Columbia Municipal Regulations (“DCMR”) §§ 5001.1, 5001.3, and 5001.5, residency is not determined by the student, but by the student’s custodian; thus, for a student to attend a D.C. public charter school free of charge, the student’s parents, guardian, or other primary caregiver must reside in D.C. As for the false statements and prohibited personnel practices charges, it alleged that Employee, with the help of Marjorie Hogan, fraudulently altered her paystub from her Maryland address to a D.C. address, so that her daughter would be able to attend KIPP, D.C. Agency offered the altered paystubs and residency verification forms submitted by Employee with her KIPP applications from 2014-2021. Agency explained that Employee knew or should have known that altering her paystubs was improper. It contended that removal was within the penalties for conduct prejudicial to the District, false statements, and prohibited personnel practices. Moreover, Agency argued that it thoroughly considered the *Douglas* factors when deciding Employee’s penalty. Therefore, it requested that OEA uphold its termination action.

The Administrative Judge (“AJ”) issued an Initial Decision on September 20, 2022. She held that Agency had cause to take the adverse action against Employee. She determined that, for several years, Employee utilized altered paystubs as part of her application for her daughter to attend KIPP. She found that the record adequately reflected that Employee altered her address on the paystubs to reflect a D.C. residence and tax withholdings. As for Employee’s argument that another employee altered her paystub, the AJ found that this did not lessen Employee’s involvement in utilizing the paystubs for her application. She opined that Employee admitted to being aware that her paystub, which was a government document, included an altered address. The AJ noted Employee’s admission that she resided in Maryland until August 2021, which helped to establish that the documents were falsified.

Additionally, the AJ ruled that Employee’s conduct was prejudicial to the government and was a prohibited personnel practice. She reasoned that given Employee’s access to financial records, honesty and integrity were important to her job. Consequently, she held that Agency proved both causes of action. Finally, the AJ held that because removal was an appropriate penalty for each cause of action, termination was reasonable under the circumstances. Therefore, she upheld Employee’s termination.

Employee made many of the same arguments in her Petition for Review that she presented to the AJ. She alleges that her co-worker, Ms. Hogan, offered to help her get

her daughter into KIPP. Employee provides that she emailed Ms. Hogan a copy of her paystub, which Ms. Hogan altered by changing her address. She asserts that although she was a Maryland resident, she used the address where her daughter resided on her enrollment form. Additionally, she contends that Agency did not consider any mitigating factors in her case. Finally, Employee renews her disparate treatment claims that she was terminated while Ms. Hogan was only suspended. Accordingly, she requests that this Board rescinds her termination and instead allows her to resign.

2. **Employee v. Department of Employment Services, OEA Matter No. 1601-0012-14AF22** — Employee was terminated from her position as an Administrative Law Judge (“ALJ”) with the Department of Employment Services (“Agency”) effective October 18, 2013. On April 22, 2016, an Office of Employee Appeals (“OEA”) Administrative Judge (“AJ”) issued an Initial Decision reversing Agency’s termination action. Employee was ordered to be reinstated to her previous position with backpay and benefits. Agency did not appeal the Initial Decision, which became final in May of 2016. On August 4, 2017, Agency issued Employee a check for back pay in the amount of \$129,766.55. On August 11, 2017, the matter was certified by the OEA General Counsel’s office to the Executive Office of the Mayor (“EOM”) Office of General Counsel (“OGC”) to certify compliance with the April 2016 order. In July of 2018, the EOM OGC issued a decision finding that Agency substantially complied with the 2016 Initial Decision; Employee’s lapse in medical insurance was solely attributable to her failure to pay her portion of the insurance fees under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”); and Employee was required to complete a fit-for-duty test as a condition to returning for work.

On February 3, 2020, Employee advised Agency that she could not produce a note related to her fitness for duty because she did not have current insurance coverage. She was advised by Agency that an emergency room doctor’s note would suffice. Agency further provided Employee with a return-to-work date of February 10, 2020. However, Employee did not report for duty from February 10, 2020, through February 28, 2020. As a result, on March 5, 2020, Agency issued Employee a Proposed Notice of Termination. Specifically, Employee was charged with Unauthorized Absence because she failed to return to work on February 10, 2020, as instructed. On August 14, 2020, Agency issued a Final Notice on Proposed Removal. The notice sustained the proposed adverse action, and Employee’s removal became effective on August 28, 2020.

Employee filed another Petition for Appeal with OEA on September 14, 2020. She argued that her termination was wrongful and asserted that Agency failed to comply with the 2016 Initial Decision reinstating her to her previous position. In response, Agency contended that it was within its authority to remove Employee for unauthorized absence under Chapter 6B, Section 1605.4 of the D.C. Municipal Regulations (“DCMR”) and the Table of Penalties, because termination for absences without prior authorization constitutes grounds for removal after the first offense. Agency explained that although it was understood that Employee was supposed to return to work on February 10, 2020, she did not. It further noted that as of February 28, 2020, when the proposed removal notice was dated, Employee still had not returned to work. As it related to Employee’s assertion that Agency failed to comply with the 2016 Initial Decision, Agency opined that there were no outstanding actions that it was required to take that would have prevented Employee from returning to work. According to Agency, the EOM was the final arbiter of whether it complied with the 2016 Initial Decision. In support thereof, it highlighted the EOM’s July 18, 2018, Memorandum and Decision which provided that Agency had substantially complied with the AJ’s order.

Agency went on to explain that in accordance with the 2016 Initial Decision, Employee was reinstated effective July 18, 2018, and was issued a check in the amount of \$129,766.55 for backpay. It stated that while the AJ ordered Agency to reinstate Employee's benefits, this part of the order could not be complied with unless she returned to work or paid her portion of health insurance. Agency highlighted that the AJ required it to reinstate Employee's benefits; however, the requirement was tied to necessary actions on Employee's part. Since the AJ did not remove the requirement that Employee pay her portion of the health insurance and/or return to work to receive health insurance, Agency reasoned that its termination action was proper. Therefore, it submitted that her termination should be upheld.

A Prehearing Conference was held in the current matter on November 16, 2021. On November 22, 2021, the AJ issued a Post-Prehearing Conference Order which directed Agency to provide the backpay worksheet related to Employee's previous case before this Office – OEA Matter No. 1601-0012-14C16. The order further provided that although Employee's previous case was captured under a separate case number, the compliance issues addressed in that matter had the potential to impact the current appeal. As a result, Employee was ordered to amend her Petition for Appeal.

Thereafter, Employee filed an Amended Petition for Appeal. She asserted that Agency engineered her functional removal only three months after being reinstated by forcing her into Absent Without Official Leave ("AWOL") status. Additionally, she argued that Agency's termination action was unwarranted because it subjected her to disparate treatment. According to Employee, although the AJ ordered that her termination be reversed with backpay and benefits in April of 2016, Agency waited until September of 2016 to complete the reinstatement and never restored her various forms of accrued leave. Employee further believed that Agency placed her in a non-pay status in November of 2016, which caused her health insurance to lapse. She submitted that Agency's termination action was unwarranted because it was retaliatory and violated her due process rights. Lastly, Employee suggested that because her removal was unwarranted pursuant to the 2016 Initial Decision, the prior appeal should be reopened for purposes of enforcement and assessing attorney's fees.

On January 7, 2022, Agency filed its Answer to the AJ's Pre-hearing Conference and Request for Hearing on Merits of February 2020 Removal. According to Agency, while it was aware that Employee's backpay worksheet existed, the document could not be located at that time. It indicated that efforts would continue to locate the worksheet. Agency subsequently filed a motion with OEA stating that Employee's backpay package was located and reiterated its request for a hearing on the merits of Employee's February 2020 removal.

On January 24, 2022, the AJ issued an order addressing Agency's request for a hearing as well as Employee's other pending motions. The order instructed that the current matter – OEA Matter No. 1601-0059-20 – be held in abeyance until Agency fully complied with the 2016 Initial Decision regarding the benefits owed to Employee. Thus, all other motions from the parties were held in abeyance pending the disposition of Employee's Motion to Reopen for Enforcement and Assessment of Attorney Fees in the 2016 matter.

On September 28, 2022, the AJ issued an Addendum Decision on Attorney's Fees in relation to the 2016 Initial Decision. He held that although Agency temporarily reinstated Employee, to date, Agency still had not fully complied with the 2016 Initial Decision. Specifically, the AJ concluded that Employee was never properly credited for her annual leave hours that she would have accrued during the period in which she was wrongfully

terminated. As it related to the issue of estoppel, the AJ stated that he was unaware that Employee accepted an Offer of Judgment (“OOJ”) in a separate, but parallel, federal case on January 2, 2022. However, he theorized that Employee was not estopped from requesting fees related to the 2016 decision before OEA.

The AJ noted that the compliance and enforcement aspects of the 2016 Initial Decision had been litigated and reviewed at great length by OEA's General Counsel's office, the EOM OGC, and the Superior Court for the District of Columbia. He went on to discuss that Employee was compelled to file an appeal of the EOM's ruling because it was misguided as to the actual benefits owed to Employee, particularly regarding annual leave hours versus the credited AWOL hours. As a result, Employee incurred legal fees while the matter was pending in Superior Court. The AJ cited to the Court's order which provided that because of the gaps in the D.C. Code and OEA rules pertaining to enforcement authority of an OEA order, neither the Court's rules, nor this Office's rules, provided for further relief after findings were issued by the EOM OGC. However, the AJ questioned whether the Court's order intended to preclude OEA from enforcing what it acknowledged to be outstanding compliance issues.

Notwithstanding, the AJ determined that an award of attorney's fees was warranted because Employee was the prevailing party in the appeal related to her 2013 removal. He also believed that an assessment of the *Allen* factors weighed in favor of an attorney fee award in the interest of justice. Concerning the reasonableness of the request, the AJ believed that Employee's application of \$367,937.50 for legal fees was unreasonable. He opined that the total number of hours reasonably expended – 238.5 – multiplied by what he determined to be a reasonable hourly rate (\$450 per hour, as provided in Employee's retainer agreement), resulted in an appropriate award amount of \$107,437.50. Therefore, Agency was ordered to pay the awarded fee within thirty days from the date on which the addendum decision became final.

On November 8, 2022, Agency filed a Petition for Review of the Addendum Decision on Attorney's Fees. The filing is captioned with OEA Matter No. 1601-0059-20. It argues that the AJ did not have jurisdiction grant attorney's fees for "lack of compliance" with the 2016 Initial Decision. Agency asserts that the AJ ignored relevant evidence and made contradictory statements in his own orders, specifically as it related to Employee's backpay package and calculations. Additionally, it opines that the AJ glossed over the significance of the OOJ, and that Employee ignored his order to produce all documents related to settlement negotiations. Moreover, Agency reasons that it substantially complied with the 2016 Initial Decision and states that the AJ acknowledged this in his September 28, 2022, order. It, therefore, believes that the interest of justice warrants the reversal of the Addendum Decision on Attorney's Fees. Consequently, Agency requests that the issue of compliance be closed with prejudice for the 2016 Initial Decision; Employee be estopped from requesting attorney's fees; OEA admonish Employee's counsel for withholding the documents requested in the OOJ; and the Board deny the award of attorney's fees. Agency also requests a hearing on the merits of Employee's February 2020 removal.

Employee filed her response on November 11, 2022. She contends that Agency's petition is impermissible because OEA's rules do not contemplate appeals of addendum decisions to the Board. Employee agrees with the AJ's conclusions of law related to the award of attorney's fees and notes that the AJ was in the best position to evaluate the veracity and reliability of the documentary and testimonial evidence regarding backpay, benefits, and attorney's fees. Further, she asserts that the attorney fees were not ordered to punish Agency for lack of compliance because counsel is entitled to such an award. Employee

also reasons that the AJ properly found it appropriate to address the motion for fees because she was the prevailing party, and an award was warranted in the interest of justice. Consequently, she asks that the Board deny Agency's Petition for Review; order Agency to fully comply with the Addendum Decision on Attorney's Fees, including reasonable interest; award fees associated with the current answer to Agency's petition; order Agency to pay all reasonable future fees; and grant any other just and proper relief.

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.”