

**DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS**

NOTICE OF PUBLIC MEETING

The District of Columbia Office of Employee Appeals will hold a meeting on June 30, 2022, 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=eb72343472d30e1964d860ea68d38087a>

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, June 30, 2022 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 Public Works, OEA Matter No. 1601-0009-20 – Employee worked as a Parking Enforcement Officer with the Department of Public Works ("Agency"). Employee was terminated as a result of a May 17, 2019, incident wherein she was accused of assaulting a citizen while on duty. The effective date of her termination was October 25, 2019. The Administrative Judge ("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 ("ORM") 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 casual 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.

2. 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"). 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).

Prior to issuing an Initial Decision, the 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.

3. Employee v. Department of Youth Rehabilitation Services, OEA Matter No. 1601-0036-19 – Employee worked as a Youth Development Representative ("YDR") the Department of Youth Rehabilitation Services ("Agency"). On November 28, 2018, Agency issued a Notice of Proposed Termination charging Employee with being Absence Without Official Leave ("AWOL"). The effective date of Agency's termination action was January 31, 2019. 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.

4. Employee v. Department of Public Works, OEA Matter No. 1601-0038-20R21— This case has been previously before the Board. Employee worked as a Parking Enforcement Officer with the Department of Public Works ("Agency"). According to Agency, on November 7, 2019, Employee submitted a urine sample which tested positive for the presence of opiates, in violation of 6B District of Columbia Municipal Regulations ("DCMR") §§ 435.6 and 1605.4(h). Consequently, he was terminated from employment effective February 22, 2020.

The Administrative Judge issued her Initial Decision on March 18, 2021. She held that there was no dispute that Employee tested positive for codeine after a random drug test on November 7, 2019. Thus, the AJ found that Agency had cause for an adverse action against Employee because of the positive test. However, she held that Agency abused its discretion by imposing a penalty of termination in this matter. According to the AJ, Employee provided justification for why he tested positive for codeine by explaining that he took his girlfriend's prescription medication the night before the test. She also considered Employee's submission from his doctor of a prescription of promethazine with codeine; his years of service; his past disciplinary history and work record; and his health/mindset at the time he took his girlfriend's medication. She explained that the range of penalty for the first offense of a positive drug test is suspension to removal. Therefore, based on the mitigating factors, the AJ held that Agency should have imposed a lesser penalty. Consequently, she ordered that Agency's termination action be reversed; that Agency reinstate Employee to his previous position of record or a comparable position; that Agency suspend Employee for fifteen (15) days for testing positive for an unlawful controlled substance (codeine) while on duty; and that Agency reimburse Employee all back pay and benefits lost as a result of the adverse action.

On April 22, 2021, Agency filed a Petition for Review. It argued that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy and that the findings of the Initial Decision were not based on substantial evidence. Agency asserted that it provided notice to Employee that because he held a safety-sensitive position, he would be deemed unsuitable if he tested positive for drugs or alcohol. According to Agency, Employee signed this notice on October 12, 2018. Thus, it contended that it could remove Employee for a positive drug test. Further, Agency argued that Employee taking prescription medication without a prescription violates both District and federal law. However, it opined that even if Employee could have taken someone else's prescription medication, an evidentiary hearing was warranted to determine if Employee was unaware that his girlfriend's prescription contained codeine; to determine if the letter from the doctor's office could be authenticated; and to determine the validity of Employee's unsworn assertions. Therefore, it requested that its petition be granted, and the Board reverse the Initial Decision.

This Board issued its Opinion and Order on Petition for Review on August 26, 2021. It found that Agency established, and Employee conceded that, as a Parking Enforcement Officer, he held a safety-sensitive position. As it related to cause, the Board held that in accordance with 6B DCMR

§§ 428.1(a), 436.6, and 1605.4(h), a positive drug test was all that was needed to establish cause. Thus, with Employee's positive submission, Agency had cause to remove him. When assessing the penalty, the Board opined that although removal is within the range of penalty for the first occurrence of a positive drug test under 6B DCMR §§ 400.4, 428.1, 435.9, and 1607, the AJ's ruling that Agency failed to consider mitigating factors and progressive discipline, required further consideration. Specifically, the Board held that the record did not support the AJ's ruling that Lindsey Parker ("Parker") was Employee's girlfriend; that Employee took medication with codeine prescribed to her; or that Parker's prescription was filled before Employee submitted to his positive drug sample. Because the Board did not believe that the record supported the AJ's mitigating factor determinations or those related to progressive discipline, it remanded the matter to the AJ for further consideration of actual evidence to support her conclusion that there were mitigating circumstances.

On remand, the AJ held an evidentiary hearing on November 17, 2021. Both parties filed closing briefs following the hearing. On March 8, 2022, the AJ issued an Initial Decision on Remand. She found that Agency had cause and could rely on its charges against Employee to impose discipline. However, she held that Agency abused its discretion by terminating Employee. The AJ opined that Agency did not consider relevant mitigating circumstances. She noted that testimony from Parker supported Employee's assertion that he unknowingly took medication with codeine prior to the random drug test. The AJ determined that Parker was credible and offered a clear picture showing that the prescription was filled on November 4, 2019, to support her testimony. Additionally, the AJ noted that once Employee realized that the medication he took included codeine, he obtained a note from Nurse Practitioner Okeyo which confirmed that Employee was seen in her office on November 7, 2019, and he took his significant other's cough syrup containing codeine prior to the drug test. The AJ provided that the note was dated November 18, 2019, nearly one month prior to Agency issuing its notice of termination. Additionally, the AJ held that Agency did not provide evidence that the Medical Review Officer ("MRO") made contact with Employee to discuss potential reasons for his positive drug test, as required. Accordingly, she ruled that Agency did not consider that this was Employee's first offense; the availability of a lesser action; Employee's years of service with Agency; Employee's past disciplinary history and work record; and his health condition at the time he took the medication which caused him to test positive.

As for the penalty, the AJ relied on Article 10, Section C of the Collective Bargaining Agreement ("CBA") between Agency and Employee's union. This section of the agreement provided that "in imposing disciplinary actions, the Department shall apply progressive discipline and shall consider the mitigating factors against the alleged offense. . . ." The AJ held that because the range of penalty was suspension to removal, termination was excessive given that this was Employee's first offense. Additionally, she held that the penalty of termination violated the Collective Bargaining Agreement which mandated progressive discipline. Accordingly, the AJ ordered that Agency's action be reversed; that Employee be reinstated to his position and reimbursed back-pay and benefits; and that a penalty of a fifteen-day suspension be imposed instead.

Agency filed a Petition for Review on April 11, 2022. It argues that the Initial Decision on Remand was based on an erroneous interpretation of statute, regulation, or policy and that the AJ's findings were not based on substantial evidence. Agency contends that its program administrator considered each of the relevant factors that the AJ determined were not considered. It provides that its administrator found that employee's disciplinary history, work record, and years of service were neutral factors. Furthermore, Agency found that Employee's representation that he tested positive because he took his girlfriend's medication, in a manner contrary to law, was not mitigating because Employee's subjective reason for taking the prescription did not mitigate the misconduct.

As for the Agency's finding regarding the MRO, Agency provided that it did not present evidence related to the MRO's review because their job was to validate drug test results and determine if a positive result was caused by the lawful use of a controlled substance. It is Agency's position that

Employee could not have provided the MRO with information that he was lawfully prescribed the opiates which caused him to test positive. It contends that Employee's positive test result was settled; therefore, it had no reason to call the MRO to testify. Finally, Agency argues that while it was required to follow the requirements of the Collective Bargaining Agreement, the agreement did not require it to retain employees in safety-sensitive positions who test positive for opiates.

5. Employee v. D.C. Public Schools, OEA Matter No. 1601-0021-21— Employee worked as an Investigator with D.C. Public Schools. On March 12, 2021, Agency issued Employee a notice of termination based on his failure to improve performance under a Performance Improvement Plan (“PIP”). The effective date of his termination was March 26, 2021. The AJ issued an Initial Decision on April 19, 2022. As it related to the issue of jurisdiction, he held that Employee filed a complaint under the D.C. Whistleblower Blower Protection Act prior to the effective date of his termination; therefore, he determined that Employee's appeal before OEA constituted a separate and distinct matter. Thus, Employee was not precluded from prosecuting his appeal before this Office. Regarding whether Employee was considered at-will at the time of termination, the AJ explained that under D.C. Code § 1-608.01a, an employee serving under the Educational Service with Agency, who is not an “excluded employee,” may be terminated after the completion of their probationary period if certain conditions are met. Since Employee's transfer to the position as an Investigator in the Educational Service occurred in 2014, the AJ concluded that he was considered at-will at the time of Agency's termination action. He explained that under D.C. Code § 1-608.01a(b)(2)(C)(ii), following the conclusion of a probationary period, an employee may be terminated at the discretion of the Mayor, provided that he or she has been given a fifteen-day separation notice and has had at least one evaluation within the preceding six months, a minimum of thirty days prior to the issuance of the separation notice. According to the AJ, it was uncontroverted that Employee completed his probationary period. It was also uncontested that Employee was provided with notice on March 12, 2021, that his termination would become effective on March 26, 2021. While the notice fell one day short of the fifteen-day requirement under § 1-608.01a(b)(2)(C)(ii), the AJ held that the error was harmless because the fifteenth day was not a business day.

However, concerning the evaluation requirement, the AJ found that Agency failed to produce evidence that Employee was provided with at least one evaluation within six months preceding the termination action. He noted that the latest documentation in Employee's personnel record with any semblance of an evaluation was his June 15, 2020, PIP, which occurred approximately nine months prior to the effective date of his termination. Because Agency failed to comply with the evaluation requirement as provided under § 1-608.01a(b)(2)(C)(ii), the AJ held that Employee's termination was improper. As a result, Agency's adverse action was reversed, and Employee was ordered to be reinstated with back pay and benefits lost as a result of his separation.

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on April 28, 2022. It contests the AJ's conclusion that Employee was not evaluated within six months of his separation and contends that the Initial Decision was not based on substantial evidence. Attached to its petition is a document titled “Manager Assessment” which reflects a submission date of May 19, 2020. According to Agency, the assessment identified areas where Employee could improve his performance. Thus, it opines that it complied with D.C. Code § 1-608.01a. Consequently, Agency asks the Board to overrule the Initial Decision and enter an order dismissing Employee's appeal. Alternatively, it suggests that the matter be remanded to the AJ to address the issue of whether Agency completed an evaluation prior to Employee's separation.

On April 28, 2022, Employee filed his response. Regarding the document that was originally attached to Agency's Petition for Review, Employee argues that the total time between May 19, 2020, when Agency purportedly completed the manager assessment, and March 12, 2021, the date Agency issued its notice of termination, was more than six months, which nonetheless violates §

1-608.01a. Additionally, Employee does not consent that the submitted document was an actual evaluation. He maintains his position that the AJ's conclusion that Agency failed to comply with the applicable statutory provisions is supported by the record.

On April 29, 2022, Agency filed a Supplement to its Petition for Review. It reiterates that Employee was properly separated in accordance with all applicable laws and contends that the AJ erred by reinstating Employee without the benefit of an evidentiary hearing. Attached to its supplement is an additional document titled "Manager Assessment." The document reflects a submission date of December 22, 2020. Agency reasons that the assessment constitutes an evaluation within the meaning of § 1-608.01a(b)(2)(C)(ii) and states that it was completed within six months of Employee's termination. Therefore, it again posits that Employee's termination was proper.

Employee also filed a Motion to Strike, stating that Agency's submitted record did not contain the alleged December 2020 manager assessment that was attached to its supplement. He notes that Agency has failed to argue that the alleged manager assessment represented new and material evidence that, despite due diligence, was not available when the record was closed. Employee believes that Agency was privy to this information prior to the closing of the record but failed to produce the document to the AJ. Accordingly, he asks that Agency's Supplement to its Petition for Review be stricken from the record. In response, Agency states that Employee's motion should be dismissed and indicates that it would have presented the alleged December 2020 assessment as evidence if the matter had gone to a hearing.

6. Employee v. Department of Public Works, OEA Matter No. 1601-0057-20—Employee worked as a Heavy Mobile Equipment Mechanic Supervisor at the Department of Public Works ("Agency"). Agency imposed a fifteen-day suspension against Employee, who was charged with "Conduct Prejudicial to the District Government: 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" and "Conduct Prejudicial to the District Government: use of (or authorizing the use of) District owned or leased property, services or funds for inappropriate or non-official purposes."

Employee filed a Petition for Appeal with the Office of Employee Appeals on September 3, 2020. He argued that the suspension was without merit and unwarranted. Employee explained that he removed his floor mats and lifted the vacuum hose, when he was approached by Mr. Harrison who stated that "this is not a government vehicle." Employee argued that he immediately rehung the hose and left the location. It is Employee's position that he never turned on the vacuum. Therefore, he requested that the suspension be rescinded.

On November 24, 2020, Agency filed its Answer to Employee's Petition for Appeal. It asserted that its final decision should not be rescinded because Employee engaged in documented conduct that was prejudicial to the government. According to Agency, Employee was caught in the act of using a government-owned vacuum by Mr. Harrison. It claimed that Mr. Harrison observed Employee vacuuming his personal vehicle for several minutes before approaching him and that when he was approached, Employee stopped vacuuming his vehicle and left the property. Moreover, Agency provided that it considered the District Personnel Manual Table of Illustrative Actions before suspending Employee and that the fifteen-day suspension was an appropriate penalty. Additionally, Agency contended that it considered the *Douglas* factors prior to imposing its penalty. As a result, it requested that its penalty be upheld or that an evidentiary hearing be held.

The OEA Administrative Judge held an Evidentiary Hearing on December 14, 2021 and requested that the parties submit written closing briefs. After the hearing, the AJ issued an Initial Decision on March 22, 2022. She determined that Agency did not have cause for the action taken against Employee. The AJ explained that Employee was charged pursuant to DCMR §§ 1607.2(a)(5) and

(a)(12) for allegedly using a car vacuum cleaner for his personal vehicle that was only to be used for government vehicles. The AJ provided that Employee was accused of this action by his supervisor, Mr. Harrison, who unfortunately passed away in January of 2021. Alternatively, Employee contended that he never actually used the vacuum and left after his encounter with Mr. Harrison. The AJ opined that none of Agency's witnesses testified that they witnessed Employee's alleged use of the vacuum. Moreover, she found that the pictures submitted by Agency did not show Employee using the vacuum. Accordingly, she found that Agency did not prove that Employee used the vacuum, as it alleged. As for Agency's argument regarding Employee's self-authorization to use the vacuum by engaging in preparatory acts, the AJ found that its argument sought the Office to examine Employee's intent regarding misconduct. She held that the regulation did not address intent and that Agency's interpretation of the regulation would lead to a slippery slope that could misalign the provisions of the regulation. Additionally, the AJ found that while it may have been Agency's practice to prohibit vacuum use, it failed to submit any written policy to establish that employees had notice of the prohibition. Consequently, because the AJ determined that Agency did not meet its burden of proof to show cause for the adverse action against Employee, she reversed the fifteen-day suspension and ordered that Agency reimburse Employee all back pay and benefits lost as a result of his suspension.

On April 22, 2022, Agency filed a Petition for Review. It argues that the Initial Decision did not address all material issues of law and fact raised on appeal; the decision was based on an erroneous interpretation of the relevant regulations; and the findings were not based on substantial evidence. Agency maintains that Employee violated DCMR § 1607.2(a)(12) by self-authorizing use of the vacuum to clean his personal vehicle. It explains that authorization to commit the act did not require completion of the act, but the mere authorization was enough for cause. Agency also contends that because authorization was prohibited, there was no slippery slope or misalignment when it analyzed Employee's intent and attempt to use the vacuum. Additionally, it asserts that the AJ did not properly address its self-authorization arguments. Furthermore, Agency opines that while there is no specific written policy about vacuum usage, it was prohibited by the DCMR. Finally, Agency provides that the AJ's credibility determinations regarding Employee were not based on substantial evidence given the contradictory statements that he provided in the record. Therefore, Agency requested that its fifteen-day suspension be reinstated, or the matter be remanded to the AJ for further consideration.

Employee filed his Answer to the Petition for Review on May 26, 2022. He asserts that the AJ considered Agency's "use" and "authorization of use" arguments. He also contends that Agency failed to meet its burden of proof to establish either actual use or the authorization of use of using the vacuum cleaner. As previously argued, Employee provides that Agency submitted no evidence to corroborate his use of the vacuum or any policies prohibiting its use. As for Agency's credibility arguments, Employee explains that there were no inconsistencies between his testimony and any prior statements he provided.

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.”